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88-190

No. ———

Supreme Court, U.S.
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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1988

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DRIVERS, CHAUFFEURS AND HELPERS LOCAL UNION No. 639 a/w INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, AFL-CIO, and JAMES F. WOODWARD,
*Petitioners,*

v.

YELLOW BUS LINES, INC.,
*Respondent.*

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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HUGH J. BEINS
Counsel of Record
JOHN R. MOONEY
BEINS, AXELROD & OSBORNE, P.C.
2033 K Street, N.W.
Suite 300
Washington, D.C. 20006-1002
(202) 429-1900
*Attorneys for Petitioners*

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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## QUESTIONS PRESENTED

1. Whether a labor organization's lawful recognitional strike constitutes participation in the affairs of the employer as an enterprise within the meaning of the federal RICO statute.

2. Whether four sporadic acts occurring during a labor organization's lawful four day recognitional strike constitute a pattern of racketeering activity within the meaning of the federal RICO statute.

## PARTIES BELOW AND AFFILIATES OF PETITIONER

Pursuant to Supreme Court Rule 21(b), Petitioner Local 639 states that it is affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO. In addition, the individual owners of Respondent, Maria Triggs, Paula Westgate and Peter McKinnon, were parties in the proceeding below.

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National Labor Relations Act, as amended, 29 U.S.C. § 141, *et seq.* ..... *passim*

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DRIVERS, CHAUFFEURS AND HELPERS LOCAL UNION No. 639 a/w INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, AFL-CIO, and JAMES F. WOODWARD,
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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

---

The Petitioners, Drivers, Chauffeurs and Helpers Local Union No. 639 (hereinafter "Local 639" or "Union") and James F. Woodward, respectfully petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in this case.

## OPINIONS BELOW

The decision of the United States Court of Appeals for the District of Columbia Circuit is reported at 839 F.2d 782 and is reproduced in the Appendix hereto at App. 1a-25a. The decisions of the United States District

Court for the District of Columbia are unreported and are reproduced at App. 26a-35a; 36a-54a; 55a-65a.

## JURISDICTION

The judgment of the Court of Appeals for the District of Columbia Circuit was entered on February 12, 1988, and is reproduced at App. 66a-67a. A timely petition for rehearing and suggestion for rehearing *en banc* was filed by the Petitioners on March 14, 1988. The court's order denying rehearing was entered on April 12, 1988, and is reproduced at App. 68a. Respondent filed a petition for rehearing on March 11, 1988. The court's order denying rehearing was entered on May 6, 1988, and is reproduced at App. 73a. This Petition is timely filed with this Court under 28 U.S.C. § 2101(c). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## STATUTORY PROVISIONS INVOLVED

The Racketeer Influenced and Corrupt Organizations provisions of the United States Code ("RICO"), 18 U.S.C. § 1961, *et seq.*, provide in relevant part:

> *Section 1961(5)*: "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter [enacted Oct. 15, 1970] and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity; . . .
>
> *Section 1962(c)*: It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.
>
> . . .

Section 7 of the National Labor Relations Act, 29 U.S.C. § 157, provides:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3) [29 U.S.C. § 158(a)(3)].

Section 13 of the National Labor Relations Act, 29 U.S.C. § 163, provides:

> Nothing in this Act [29 U.S.C. §§ 151-168], except as specifically provided for herein, shall be construed so as either to interfere or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right.

## STATEMENT OF THE CASE

### A. The Organizing Effort

Yellow Bus Lines, Inc. ("Yellow Bus" or "Company") was created in 1979 and, due to undercapitalization, experienced financial difficulties from its creation through its demise in 1984. The Company was always delinquent in paying taxes, operated with antiquated and dilapidated equipment, and paid its employees low wages and no benefits. In response to their substandard conditions, the employees of Yellow Bus contacted the Union in October 1981 to discuss organizing for the purpose of collectively bargaining. (App. 3a, 9a, 29a, 32a).

After a majority of the employees (eight of twelve) designated Local 639 as their collective bargaining agent, organizer James Woodward made a demand for recognition. The Company refused to recognize or bargain with the Union. Upon learning of the Company's refusal, the employees met and decided to strike in support of

their demand. A four day strike commenced on November 9, 1981. (App. 3a, 29a, 37a).

Although the eight strikers comprised a majority of the Company's drivers, Yellow Bus was able to operate throughout the four day strike. According to Yellow Bus, the strike was marred by threats and vandalism against Company property. (App. 3a, 29a, 37a). The property damage occurring during this time totalled approximately $1,800. The Company claimed that Woodward had threatened to burn Company property on the first morning of the strike. Owner Triggs then contacted a police officer and procured Woodward's arrest. (App. 3a, 37a).

Soon after the strike, the Union filed a representation petition with the National Labor Relations Board ("NLRB" or "Board"). An election was held in December 1981 but was set aside by the Board because of the Company's misconduct. The Board also issued a Complaint against Yellow Bus charging multiple violations of Section 8(a)(1), (3) and (5) of the National Labor Relations Act ("NLRA" or "Act"). 29 U.S.C. § 158(a)(1), (3) and (5). In settlement of the Complaint, Yellow Bus agreed to a second election and reinstated with full back pay an employee it had accused of vandalism during the strike. The Union prevailed in the December 1982 election and was certified by the Board. Despite months of bargaining, the parties never reached agreement on a contract.

**B. The Litigation**

The federal court litigation began almost one year after the strike. Initially, Woodward filed an action for false arrest against the Company and its owners, as well as the District of Columbia. His suit was based on the discovery that police officer Michael DiPalermo, who was responsible for his arrest, was engaging in an illicit affair with Company owner Triggs at the time of his arrest. Yellow Bus and its owners counterclaimed for

malicious destruction of property, intentional interference with contract, intentional infliction of emotional harm and abuse of process. (App. 3a-4a, 30a, 37a).

In April 1983, Yellow Bus and its owners initiated their action against the Union and Woodward. In addition to the common law tort claims, they charged Local 639 and Woodward with violations of the secondary boycott prohibition contained in 29 U.S.C. §§ 158(b)(4) and 187, and with violations of RICO Sections 1962(c) and (d). In essence, they claimed that the Union was totally responsible for their business failures, including their failure to remit payroll taxes to the Internal Revenue Service. The Union was also allegedly responsible for McKinnon's departure from Yellow Bus.[1] Inasmuch as McKinnon was the only skilled mechanic Yellow Bus could afford to retain, his abrupt departure caused a rapid deterioration of the ancient equipment. (App. 4a, 9a, 32a, 38a).

In June 1984, the district court dismissed the racketeering and secondary boycott charges against Local 639. (App. 52a-54a). The RICO claim was dismissed on the grounds that Local 639 could not be both the requisite enterprise and a culpable defendant under Section 1962 (c). (App. 12a, 41a-46a). In October 1984, the racketeering charges against Woodward were dismissed because Yellow Bus failed to allege a racketeering injury.[2] (App. 12a, 56a, 58a-62a). By that time Woodward had received some $3,000 in settlement of the false arrest suit with

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[1] In 1982 McKinnon suffered a psychotic episode and experienced delusions that he was the second coming of Christ. He repeatedly threatened the other owners with physical harm and attempted to murder co-owner Westgate, his sister. After Westgate and Triggs refused to buy out his one-third interest in Yellow Bus, he vandalized one-third of the Company's buses. (App. 32a).

[2] The district court issued its ruling dismissing the RICO claim against Woodward prior to this Court's decision in *Sedima S.P.R.L. v. Imrex Co.*, 473 U.S. 479 (1985).

the District of Columbia. He then dismissed his action. (App. 10a, 34a-35a).

Despite dismissal of all federal claims, the district court elected to retain jurisdiction of the case. (App. 58a, 63a-65a). The trial on the remaining charges began in February 1985. After three weeks of trial, the jury returned a verdict in favor of Yellow Bus on three counts with damages totalling $133,200. Yellow Bus was awarded $1,280 against Woodward and $1,920 against the Union for malicious destruction of property, and $40,000 against Woodward and $60,000 against the Union for intentional interference with contractual relations. The jury also awarded Yellow Bus and its owners $15,000 from both Woodward and the Union for abuse of process. (App. 2a, 4a).

In January 1986, the district court overturned all of the jury's findings except for the verdict concerning Woodward's liability for strike-related vandalism. It then entered judgment against Woodward for approximately $1,200. (App. 26a-27a, 35a).

In reviewing the factual background surrounding the creation of Yellow Bus and the history of the litigation, the trial court analyzed Yellow Bus' claim that its business demise was the responsibility of the Union and Woodward. In the first instance, the district court cited the undisputed record evidence that Yellow Bus' difficulties with the Jewish Day School, its primary if not exclusive customer, occurred one year after the strike. (App. 31a). The court then found that there were two reasons for the loss of the contract: (1) the company's failure to properly perform under the contract, and (2) its tax-related problems with the Internal Revenue Service. "Neither of these arose from [the Union or Woodward's] activities." (App. 31a). As to the allegations concerning employees' post-strike activities, the court relied on the owners' admissions in concluding that there

was no evidence that the Union or Woodward bore any "responsibility for any of the drivers' absenteeism, tardiness or maintenance problems." (App. 32a). The district court concluded that there was "no proof, clear or otherwise, of a causal connection between defendants' alleged conduct" and the financial demise of Yellow Bus. (App. 31a).

The appellate panel substantially upheld the trial court's factual findings. In particular, it agreed with the lower court that there was no proof of any connection between the Union's and Woodward's activities and the loss of Yellow Bus' contract with the Jewish Day School. (App. 8a-9a). The panel noted that "the two factors precipitating the cancellation—Yellow Bus' tax liabilities and inadequate service--had nothing to do with [Defendants'] activities." (App. 8a-9a). In upholding the lower court's decision to overturn the verdict on the issue of interference with contracts,[3] the court of appeals stated that:

> Yellow Bus' difficulties with the IRS pre-dated the Local's involvement with the company. Abundant testimony linked the company's poor performance to lax employee discipline and the rapid deterioration of the company's stock of antiquated buses after the departure of its only skilled mechanic in the fall of 1982. A number of Yellow Bus' own witnesses admitted that these difficulties were not traceable to appellees' efforts or actions. [(App. 9a).]

In addition to issues relating to the entry of judgment notwithstanding the verdict, the panel reviewed the dismissal of the racketeering claims. Although the court of

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[3] The appellate court also upheld the district court's ruling overturning the verdict on the abuse of process claim. (App. 9a-10a). In addition, it reversed the trial judge's decision to overturn the claim against the Union concerning strike-related vandalism, holding that, under settled agency principles, the Union is liable for Woodward's activities. (App. 4a-8a). The Union does not contest this reversal.

appeals agreed with the district court that the Union could not be both the enterprise and a defendant, it stated that Yellow Bus could properly designate itself as the affected enterprise. (App. 12a, 17a). Moreover, the court ruled that solely as a result of the lawful recognitional strike, the Union and Woodward became sufficiently related to Yellow Bus' business for it to claim that they were participating in its affairs within the meaning of Section 1962(c). (App. 22a).

Finally, the panel held that the four alleged incidents of threats or vandalism occurring during the strike constituted a pattern of racketeering activity within the statutory definition contained in Section 1961(5). (App. 11a, 23a). Acknowledging this Court's direction that the predicate acts comprising a pattern must demonstrate "continuity plus relationship," the court ruled that Yellow Bus' accusations of "acts of vandalism and intimidation during a specific time period in pursuit of a unitary goal" met the statutory standards. (App. 11a). See *Sedima S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 496 n. 14 (1985).

Judge Edwards concurred in the panel decision but admitted to having "nagging doubts" about the holding that the Union's and Woodward's organizational activities were "affairs" of Yellow Bus. (App. 25a). Labeling such a result "strangely at odds with certain fundamental precepts of labor law and collective bargaining," he concurred "albeit with pause." (App. 25a).

The Union and Woodward sought rehearing and suggested an *en banc* review by the full court of appeals. Dissenting from the court's denial of that petition, Judge Sentelle, joined by Judge Starr, acknowledged the "serious errors" of the panel's decision. In particular, the dissent noted that the decision disturbed the precarious balance between labor and management struck by federal labor laws. (App. 71a). They also recognized that the court's interpretation of a RICO "pattern" conflicted with

rulings in at least four other circuits. (App. 71a). Finally, the dissent warned that the practical intersection of these two "misreadings" of RICO would serve to chill the exercise of the right to strike protected by federal law. (App. 71a-72a).

## REASONS FOR GRANTING THE WRIT

This case presents two significant issues warranting this Court's review. The first question concerns the application of the civil racketeering provisions to the traditional and lawful organizing activities of a labor organization. The court of appeals decision held that by engaging in a recognitional strike against Yellow Bus, activity protected by federal labor laws, the Union participated in the affairs of Yellow Bus under RICO, the federal racketeering law. The decision below extended the scope of RICO, for the first time, in a manner that will seriously disrupt the balance between the economic weapons available to participants in labor disputes and impair the right to strike, the most fundamental right accorded employees and protected by law. In converting the Union's entirely legal, but inherently adversarial, conduct into participation in the "affairs" of an employer for purposes of RICO, the court of appeals ignored the statutory provisions protecting such activity as well as the decisions of this Court seeking to preserve this precarious balance. The unprecedented decision below to extend RICO into an area protected by federal labor policy raises labor law issues of far-reaching consequence and should be addressed by this Court.

The second issue presented for review extends beyond the field of labor relations. The court of appeals interpreted the pattern requirement of Section 1962(c) in such an expansive manner as to allow a RICO plaintiff to premise its action on minor and unrelated incidents occurring over a brief and limited period of time in pursuit of a single legitimate goal. The appellate decisions

on this issue are widely divergent and the ruling below is directly contrary to the decisions of a number of other circuits. In view of the clear schism within the circuits, this Court must resolve this issue so as to assure uniform interpretation of RICO throughout the nation.[4]

The most compelling reason warranting review, however, results from the combined effect of the two holdings challenged above. If the ruling below is allowed to stand, every time two minor incidents occur in the context of a single organizational campaign, the union and employees will be subject to federal civil racketeering actions. (App. 62a, 71a-72a). The chilling effect of such proposition will only serve to thwart the exercise of the rights federal labor law seeks to protect. Moreover, in view of the treble damages and attorneys fees available under RICO, the decision will also encourage employers to ignore traditional remedies in state forums and to litigate strike misconduct cases in federal courts. (App. 61a-62a).

### I. A Lawful Organizational Strike as Participation in The Affairs of an Employer

The panel's pronouncement that a union's traditional organizational activities can be considered an "affair" *of an employer* so as to enable the employer to bring a RICO action under Section 1962(c) has created a doctrine that will seriously disrupt national labor policy. As noted by Judge Edwards, the court of appeals' reading of RICO is "strangely at odds" with fundamental principles of labor law and collective bargaining. (App. 25a).

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[4] On March 21, 1988, this Court granted a writ of certiorari in *H.J., Inc. v. Northwestern Bell Telephone Company*, —— U.S. ——, 99 L.Ed.2d 420 (1988), citation below, 829 F.2d 648 (8th Cir. 1987). The specific question presented for review in that matter is whether there was a pattern of racketeering under RICO.

In enacting the National Labor Relations Act and its progeny, Congress endeavored to establish a single body of law that would govern disputes between labor and management. *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 236 (1963). At the foundation of this regulatory scheme is the recognition of the adversarial tension and dynamics inherent in labor management disputes. In *NLRB v. Insurance Agents' International Union*, 361 U.S. 477, 488 (1960), this Court noted that labor relations and collective bargaining "proceed from contrary, and to an extent antagonistic viewpoints and concepts of self interest." Justice Brennan, writing for the Court, added that:

> [t]he presence of economic weapons in reserve, and their actual exercise on occasion by the parties, is part and parcel of the system that the Wagner and Taft-Hartley Acts have recognized. [*Id.* at 489.]

Recognizing the need for regulation of these available economic measures, federal labor law has carefully preserved a precarious balance between those weapons available to labor organizations and to employers during a labor dispute. *American Ship Building Co. v. NLRB*, 380 U.S. 300, 316-17 (1965); *NLRB v. Brown*, 380 U.S. 278 (1965); *Golden State Transit Corp. v. Los Angeles*, 475 U.S. 608, 618-20 (1986); *Machinists v. Wisconsin Employment Relations Commission*, 427 U.S. 132, 143-46 (1976); *Teamsters v. Morton*, 377 U.S. 252, 258-59 (1964).

Paramount among the economic weapons available to unions and employees is the right to strike. The right to strike is protected concerted activity under Sections 7 and 13 of the Act. 29 U.S.C. §§ 157, 163. *Steelworkers v. NLRB (Carrier Corp.)*, 376 U.S. 496, 499 (1964); *Brotherhood of Railroad Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, 385 (1969). Indeed the Act states that it shall not be construed "to interfere with or im-

pede or diminish in any way the right to strike" except as expressly provided by law. 29 U.S.C. § 163. When coupled with the fundamental right to organize, it becomes clear that an organizational strike is likewise protected under the federal labor laws. *NLRB v. Teamsters Local 639 (Curtis Bros.)*, 362 U.S. 274, 290-91 (1960).

The application of a civil RICO action to traditional labor activity occurring during a legitimate labor dispute provides a new and devastating weapon to employers and upsets the sensitive balance that Congress established between labor and management. In order to fit traditional labor activity into the RICO statutory scheme, the panel was compelled to characterize the Union as having participated in the affairs of the struck company and to conclude that "Yellow Bus and the union had a full-fledged 'business relationship.'" (App. 22a). This statement is ironic in the context of this case, where the strike was unsuccessful, and reflects a fundamental misunderstanding of the generally adversarial nature of labor relations. See *First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 676 (1981) ("Congress had no expectation that the elected Union representative would become an equal partner in the running of the business enterprise . . .").[5]

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[5] In support of its reasoning, the panel relied primarily upon *United States v. Scotto*, 641 F.2d 47 (2d Cir. 1980), *cert. denied*, 452 U.S. 961 (1981). (App. 20a). That case, however, is readily distinguished and suggests a result contrary to that reached by the panel. Indeed, it supports the common sense finding by the district court that Local 639 was the only appropriate enterprise under Section 1962(c). (App. 41a-43a) In *Scotto*, a union president and executive vice president were convicted of RICO violations for obtaining illegal payments from employers that employed the union's members and with which the union had a collective bargaining relationship. The faulty parallel to the instant matter is that Yellow Bus was an employer allegedly being intimidated by the organizing activities. In *Scotto*, however, the requisite enterprise under the Section 1962(c) charge was Local 1814 of the International Longshoremen's Association, *i.e.*, the union in which the de-

If a defendant pursues an illicit joint venture with persons representing the enterprise for an unlawful purpose it may well be appropriate to deem the defendant to be participating in the enterprise's affairs. *United States v. Yanon*, 800 F.2d 164 (7th Cir. 1986), *cert. denied*, 107 S.Ct. 930 (1987). Union activity such as Local 639's and Woodward's, however, has an object that is intrinsically antagonistic to the employer as well as lawful and legitimate—the organization of the company's employees. There is no criminal or collusive element inherent in a union's attempt to organize an employer nor can the goal of a collective bargaining relationship be reasonably deemed a "full-fledged business relationship."

The tense reality of the picket line has been long recognized by this Court. A strike can be a heated affair, a "brute contest of economic power," in which the availability of strong economic weapons is the keystone to effective collective bargaining and ultimately to labor peace. *NLRB v. Insurance Agents' International Union*, 361 U.S. at 489. See also *Bonanno Linen Service v. NLRB*, 454 U.S. 404 (1982). Reckless and imprecatory language and overzealous conduct that in other contexts might be subject to sanction is a natural outgrowth of the intense feelings that develop in labor disputes and a reality of industrial life. *Linn v. United Plant Guard Workers*, 383 U.S. 53, 58 (1966); *Milk Wagon Drivers Union, Local 753 v. Meadowmoor Dairies*, 312 U.S. 287, 293 (1941); *Republic Steel Corp. v. NLRB*, 107 F.2d 472, 479 (3d Cir. 1939), *modified*, 311 U.S. 7 (1940). Minor scuffles, abusive language, and annoying incidents of mu-

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fendants held positions. It was the union's affairs, not the employers', with which the defendants were associated and the union's affairs that they conducted through a pattern of racketeering. See also *United States v. LeRoy*, 687 F.2d 610, 616-617 (2d Cir. 1982), *cert. denied*, 459 U.S. 1174 (1983); *United States v. Dennis*, 458 F.Supp. 197 (E.D. Mo. 1978), *aff'd on other grounds*, 625 F.2d 782 (8th Cir. 1980).

tual harassment are commonplace. *North Cambria Fuel Co., Inc. v. NLRB*, 645 F.2d 177, 181 (3d Cir.), *cert. denied*, 454 U.S. 1123 (1981). Even incidents of overt violence have been examined in light of the purposes underlying the federal labor statutes and been found to be beyond the reach of other federal statutory schemes. *United States v. Enmons*, 410 U.S. 396 (1973) (violence during labor dispute to induce employer's agreement to legitimate collective bargaining demands is not extortionate nor actionable under the Hobbs Act, 18 U.S.C. § 1951). See also *Carpenters v. Scott*, 463 U.S. 825, 838-39 (1983). The necessarily antagonistic nature of any traditional labor strike provides both the environment and the incentive for the employer to retaliate against the union by filing a RICO action. If the ruling below is allowed to stand, RICO-based suits will become part and parcel of every strike.[6]

In view of the above, and the "likely, if not inevitabl[e]" recurrence of such situations (App. 71a), this Court must intervene in order to preserve the balance that Congress established between labor and management as well as to protect the rights accorded unions and employees under federal labor law.

**II. The Pattern of Racketeering Activity**

In order to establish a claim under Section 1962(c), a plaintiff must establish that the affairs of the enterprise were conducted "through a pattern of racketeering activity." Section 1961(5). In *Sedima S.P.R.L. v. Imrex*

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[6] Certain types of conduct including allegations of threats, violence and property damage are so deeply rooted in local feeling and responsibility that they are properly left to the states for adjudication. See *Automobile Workers v. Russell*, 356 U.S. 634 (1958); *United Construction Workers v. Laburnum Construction Corp.*, 347 U.S. 656 (1954). Because of the treble damages and attorneys fees available under RICO (18 U.S.C. § 1964(c)), the predictable effect of the panel's opinion will be to federalize these traditionally local actions.

*Co., Inc.*, 473 U.S. 479 (1985), this Court suggested that the "'extraordinary" uses to which civil RICO had been applied were due in part to "the failure of Congress and the courts to develop a meaningful concept of pattern." *Id.* at 500. In footnote 14, the Court reviewed the Congressional directive that a pattern is not properly comprised of sporadic and isolated events but must evidence a "continuity plus relationship." *Id.* at 496, n. 14. The dissent also stated that the statutory provision "may logically be interpreted as meaning that the presence of the predicate acts is only the beginning: something more is required for a pattern to be proved." *Id.* at 527.

Since this Court's 1985 pronouncement, the lower courts have struggled to apply the "continuity plus relationship" language to civil RICO actions. The result, however, has been a confusing and inconsistent assortment of decisions. There currently exist among the circuits variant interpretations of this language resulting in contradictory rulings. The interpretation of the "pattern" requirement adopted by the court below squarely conflicts with the decisions of several courts.

In the instant case, the panel joined those circuits adopting an expansive definition of pattern. The appellate panel stated that four incidents occurring during the four day strike in pursuit of union recognition properly satisfied the "continuity plus relationship" test. (App. 11a, 23a). Thus the District of Columbia Circuit appears to have adopted the liberal approach of the Fifth and Eleventh Circuits. See *R.A.G.S. Couture v. Hyatt*, 774 F.2d 1350 (5th Cir. 1985) (two predicate acts alone suffice to establish a pattern); *Smith v. Ayres*, 845 F.2d 1360, 1365 n. 18 (5th Cir. 1988) (despite substantial authority to the contrary the panel is bound by *R.A.G.S.*); *Smith v. Cooper/T. Smith Corp.*, 846 F.2d 325, 329 (5th Cir. 1988); *Bank of America National Trust & Savings Association v. Touche Ross & Co.*, 782 F.2d 966 (11th Cir. 1986).

In stark contrast to the liberal approach, the Fourth, Eighth and Tenth Circuits have relied on *Sedima* to hold that the mere existence of several predicate acts does not establish a pattern. *Flip Mortgage Corp. v. McElhone*, 841 F.2d 531, 538 (4th Cir. 1988) (acknowledging split in the circuits and holding that a single scheme to defraud does not establish pattern); *International Data Bank, Ltd. v. Zepkin*, 812 F.2d 149, 155 (4th Cir. 1987); *Pitts v. Turner & Boisseau, Chtd*, —— F.2d ——, 1988 U.S. App. Lexis 9108, 6 (10th Cir. 1988) (requirement of separate schemes); *Superior Oil Co. v. Fulmer*, 785 F.2d 252, 257 (8th Cir. 1986) (where evidence reveals one scheme, no pattern exists regardless of the number of predicate acts involved in that scheme); *Terre Du Lac Association, Inc. v. Terre Du Lac, Inc.*, 834 F.2d 148, 149-50 (8th Cir. 1987); *United States v. Kragness*, 830 F.2d 842, 858 (8th Cir. 1987).

The other circuits have also grappled with the proper scope of the pattern requirement. In *Beauford v. Helmsley*, 843 F.2d 103, 108-110 (2d Cir. 1988), and *Creative Bath Products, Inc. v. Connecticut General Life Ins. Co.*, 837 F.2d 561, 564 (2d Cir. 1988), the Second Circuit has relied on the fact that the alleged schemes were carried out in pursuit of a single short-lived goal and therefore ruled that they did not satisfy the continuity requirement.[7] Obviously, if this reasoning were applied by the District of Columbia Circuit, the RICO allegations against Local 639 and Woodward would have been dismissed.

In *Marshall-Silver Construction Co. v. Mendel*, 835 F.2d 63, 66-67 (3d Cir. 1987), the Third Circuit held that

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[7] The Second Circuit has recognized that it suffers from an internal split and has granted a petition for rehearing *en banc* in *Creative Bath Products, Inc., supra*. Nevertheless, the court continues to pursue the proper scope of the pattern requirement. See *Field v. Trump*, —— F.2d ——, 1988 U.S. App. Lexis 9167, 35-36 (2d Cir. 1988).

RICO is aimed at the eradication of activity that "because of its organization, duration, and objective poses, or during its existence posed, a threat of serious injuries over a significant period of time." Because the activity in that case involved a single victim with a single injury, and involved a single brief scheme with a small number of perpetrators, the court upheld dismissal of the RICO claim. *Id.* at 67. Once again, if the facts of the instant case were evaluated under that standard, Yellow Bus' RICO claims would have been properly dismissed. Despite the *Marshall-Silver* decision, the Third Circuit has continued its efforts to decipher the riddle of what constitutes a pattern. See *Saporito v. Combustion Engineering, Inc.*, 843 F.2d 666, 676-77 (3d Cir. 1988); *Barticheck v. Fidelity Union Bank/First National State*, 832 F.2d 36, 40 (3d Cir. 1987).

Similarly, the Ninth Circuit has ruled that civil RICO does not reach a single scheme affecting a single victim that terminates on a date certain. *Medallion Television Enterprises, Inc. v. SelecTV of Cal., Inc.*, 833 F.2d 1360, 1363-64 (9th Cir. 1987); *California Architectural Bldg. Products, Inc. v. Franciscan Ceramics*, 818 F.2d 1466 (9th Cir. 1987), *cert. denied*, —— U.S. ——, 98 L.Ed.2d 650 (1988) (a single fraud perpetrated upon a single victim is not sufficiently continuous). Cf. *Sun Savings & Loan Assoc. v. Dierdorff*, 825 F.2d 187, 193-94 (9th Cir. 1987) (separate schemes are not required, only acts that are not sporadic or isolated). The only "scheme" alleged in the case *sub judice* was the effort to obtain recognition and the only alleged "victim" was Yellow Bus. Moreover, the "scheme" terminated upon cessation of the four day strike. Under this analysis, the action would have been dismissed. Compare *United Energy Owners Committee, Inc. v. United Energy Management Systems, Inc.*, 837 F.2d 356, 360-61 (9th Cir. 1988) (multiple acts of fraud involving multiple victims over more than one year establishes sufficient pattern).

Finally, the Seventh Circuit has taken the approach that the question of whether a pattern exists is "a fact specific question encompassing many relevant factors." *Jones v. Lampe*, 845 F.2d 755, 757 (7th Cir. 1988). Included among the factors are the number and variety of predicate acts, the number of victims, the presence of separate schemes and the occurrence of distinct injuries. *Id.* Relying on these factors, the Seventh Circuit has held that multiple predicate acts in furtherance of a single scheme involving one victim does not constitute a pattern of racketeering. *Tellis v. U.S. Fidelity & Guaranty Co.*, 826 F.2d 477, 478 (7th Cir. 1987). See also *Medical Emergency Service Associates S.C. v. Foulke*, 844 F.2d 391 (7th Cir. 1988) (several predicate acts relating to single victim with single injury occurring within two month period do not constitute a pattern).

As previously recognized by this Court, "the heart of any RICO complaint is the allegation of a *pattern* of racketeering." *Agency Holding Corp. v. Malley-Duff & Assoc., Inc.*, 483 U.S. ——, 97 L.Ed.2d 121, 132 (1987) (emphasis in original). In *Agency Holding Corp.*, this Court recognized that a uniform limitations period was required "to avoid intolerable 'uncertainty and time consuming litigation.'" *Id.* at 129, citing *Wilson v. Garcia*, 471 U.S. 261, 272 (1985). Accordingly, here as in *Sedima, supra*, this Court should grant certiorari because of "the variety of approaches taken by the lower courts and the importance of the issues." 473 U.S. at 486. Petitioners submit that these considerations must apply to the instant matter and that the conflicts now existing on this issue lying at the heart of every RICO action must be resolved.

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

HUGH J. BEINS
Counsel of Record
JOHN R. MOONEY
BEINS, AXELROD & OSBORNE, P.C.
2033 K Street, N.W.
Suite 300
Washington, D.C. 20006-1002
(202) 429-1900
*Attorneys for Petitioners*

August 1988

# APPENDIX

# APPENDIX

**APPENDIX**

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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No. 86-5135

YELLOW BUS LINES, INC.,
*Appellant*

v.

DRIVERS, CHAUFFEURS & HELPERS
LOCAL UNION 639, *et al.*

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No. 86-5136

JAMES F. WOODWARD

v.

MICHAEL DIPALERMO, *et al.*

MARIA TRIGGS, Secretary/Treasurer,
YELLOW BUS LINES, et al.,
*Appellants*

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Appeals from the United States District Court
for the District of Columbia
(Civil Action Nos. 83-01232 and 82-03154)

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Argued September 15, 1987

Decided February 12, 1988

*Thomas G. Corcoran, Jr.* for appellant.

*John R. Mooney*, with whom *Hugh J. Beins* was on the brief for appellees.

Before: WALD, *Chief Judge*, MIKVA and EDWARDS, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* MIKVA.

Concurring statement filed by *Circuit Judge* EDWARDS.

MIKVA, *Circuit Judge*: This litigation arises from events surrounding a four day strike by employees of Yellow Bus Lines, Inc. for recognition by the company of a union local, Drivers, Chauffers, and Helpers Local 639 ("Local 639" or "the Local"), as their collective bargaining representative. Believing that the union had engaged in a campaign of violence to sabotage the company and obtain labor concessions, Yellow Bus and three of its officers ("Yellow Bus" or "appellants") filed claims and counterclaims in these consolidated cases against the Local and its business agent and trustee James Woodward, accusing them of engaging in a "pattern of racketeering activity" in violation of § 1962 (c) and (d) of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §§ 1961 *et seq.* (1982) and alleging violations of tort law.

After the judge dismissed the RICO charges, the remaining counts were tried before a jury. The jury awarded damages against the Local and Woodward on three tort claims. Yellow Bus appeals from the district court judge's partial grant of appellees' motion for judgment notwithstanding the verdict (JNOV) setting aside each verdict except that against Woodward for malicious destruction of property. Appellants also challenge vari-

ous pre-trial orders, including denial of leave to amend the RICO complaint and dismissal of the RICO counts.

Because we find that the RICO dismissal and the denial of leave to amend were error, we reverse and remand on that ground. For reasons set forth below, we also vacate the judgment notwithstanding the verdict against the Local on malicious destruction of property. In all other respects, we affirm the judgment of the district court.

## I. Background

In 1979, appellants Maria Triggs, Paula Westgate, and her brother Peter McKinnon created Yellow Bus Lines, Inc., a Virginia corporation located and operated in the District of Columbia. In October 1981, a number of Yellow bus employees met with Local 639 business director Woodward for the purpose of organizing the company employees. After Yellow Bus refused to recognize and bargain with the union, a strike was called on November 9, 1981.

According to Yellow Bus, the strike was marred by threats and violence against company property by Woodward and other strikers. As a result of one incident in which Woodward allegedly threatened to "burn the company buses", Ms. Triggs called the police. Woodward was briefly arrested and charged in a three-count felony indictment for threatening to damage the buses.

Proceedings in the court below were initiated one year after the strike, when Woodward filed suit on November 4, 1982 against District of Columbia police officer Michael DiPalermo, the city, and three officers of Yellow Bus alleging abuse of process and false arrest. The defendants in that action, *Woodward v. DiPalmero, et al.*, Civ. No. 82-3154, then counterclaimed, alleging malicious destruction of property and intentional interference with contract as well as intentional infliction of emotional distress. They also charged Woodward and the Local with

abuse of process, claiming that Woodward filed his false arrest claim to discover information essential to his criminal defense and to induce Yellow Bus to agree to the Local's proposed contract terms. In April 1983, Yellow Bus filed additional charges against Woodward and the Local alleging violations of RICO, 18 U.S.C. §§ 1962(c) and (d). By October 1984, the district court had dismissed all the federal claims, but elected to retain jurisdiction over the tort claims. In May 1984, Woodward's false arrest claim was dismissed after Woodward reached a settlement with the District of Columbia. The trial on the remaining counts began in February 1985, and the jury returned a verdict in favor of appellants on three counts, awarding a total of $133,200. Yellow Bus was awarded $1,280 against Woodward and $1,920 against Local 639 for malicious destruction of property, and $40,000 against Woodward and $60,000 against the Local for intentional interference with contractual relations. The jury also awarded the company and its three officers $15,000 against Woodward and $15,000 against the Local for abuse of process. In March 1985, the court entered judgment for these amounts. In January 1986, the court partially granted appellees' JNOV motion and set aside all except the $1,280 judgment against Woodward for malicious destruction of property.

## II. JNOV on Malicious Destruction of Property

In support of its claim of malicious destruction, Yellow Bus introduced testimony of damage to vehicles observed by employees at the strike site. Although no employee saw Woodward participate directly in vandalism, the court found that "circumstantial" evidence linking Woodward to property damage, coupled with threats made by Woodward and other strikers, was sufficient to support the jury determination that Woodward was liable for the property damage. The court decided, however, that the evidence against the Local was insufficient to support liability under § 6 of the Norris-LaGuardia Act, which

requires clear proof of union responsibility for the acts of its agents.

Section 6 of the Norris-LaGuardia Act states that

> No officer or member of any association or organization, and no association or organization participating or interested in a labor dispute shall be held responsible or liable in any court of the United States for the unlawful acts of individual officers, members, or agents, except upon clear proof of actual participation in, or actual authorization of, such acts, or of ratification of such acts after actual knowledge thereof.

29 U.S.C. § 106 (1982). Section 6 applies in "federal court adjudications of state tort claims arising out of labor disputes." *United Mine Workers v. Gibbs*, 383 U.S. 715, 737 (1965). See also *Ramsey v. United Mine Workers*, 401 U.S. 302, 310 (1970). In order to support a grant of the motion for JNOV, the trial judge must conclude that a reasonable jury could not have found "clear proof" of the union's participation or authorization. *See Anderson v. Liberty Lobby, Inc.* 106 S. Ct. 2505, 2512-13 (1986). After reviewing the record and taking all justifiable inferences in favor of appellants, we conclude that a reasonable jury could have found "clear proof" of union ratification or authorization of Woodward's actions, and that the damage award against the Local on this count should not have been set aside.

In evaluating whether Local 639 "ratified" the destructive acts ascribed to Woodward "after actual knowledge" of their perpetration, the district court failed to take into account a crucial piece of evidence concerning the Local's awareness of the events which transpired during the Yellow Bus strike. At trial, counsel for Yellow Bus introduced without objection a letter sent by Yellow Bus and received by Mr. George, President of Teamsters Local 639, on November 10, 1981. This letter described with particularity "numerous incidents of

threats, violence, property damage, and verbal abuse" by Woodward and other strike participants. Following this communication, the record shows that business continued as usual at the Yellow Bus strike and Mr. Woodward remained on-site as the Local's man in charge. There is nothing in the record to indicate that the union took any action to investigate the allegations or to curb any excesses of Woodward or the strikers.

In the circumstances of this case, the combination of the Local's notification of events early in the strike, coupled with the complete failure to act on that knowledge, fulfills the requirement of "proof, either that the union approved the violence which occurred, or that it participated actively or by knowing tolerance in further acts which were in themselves actionable under state law." *Gibbs*, 383 U.S. at 739. A union may "ratify" or "authorize" without going so far as to openly encourage or embrace the tactics of its official representative. Section 6 does not impose a requirement of such formal authorization by the union. See *James R. Snyder Co. v. Edward Rose & Sons., Inc.*, 546 F.2d 206 (6th Cir. 1976). Rather, "proof of authorization or ratification can be based upon circumstantial evidence, but that proof, although circumstantial, must nevertheless be clear." *Id.* at 209. From the Local's apparent lack of concern with the violence brought to its attention, the jury plausibly could conclude that the Local "knowingly tolerated" this state of affairs. No more is required to support a finding of ratification. In short, there was clear proof that the other officials at the Local ratified by knowing tolerance those acts of violence in which Woodward was shown to have participated.

Moreover, specific proof of "knowing tolerance" by other union officials was not required in order to hold the Local directly responsible for Woodward's actions because Woodward was clothed with plenary authority to direct the strike on behalf of the union. Section 6 was meant

to "change[] the substantive law of agency," *Brotherhood of Carpenters v. United States*, 330 U.S. 395, 403 (1946), by nullifying the doctrine of *respondeat superior* in those cases where a union member or official has *not* been charged with directing union activities. That provision does not serve to absolve a union of ordinary responsibility for actions undertaken by officers exercising authoritative responsibility. For example, in *Charles D. Bonanno Linen Service, Inc. v. McCarthy*, 708 F.2d 1, 11 (1st Cir.), *cert. denied*, 464 U.S. 936 (1983), evidence that a union representative "with the power and authority" to orchestrate a strike and discipline participants took no action to curb strike violence was held sufficient to establish liability of a union local. As the *Bonanno* court observed, "the Supreme Court has held that the union need do no more than authorize an agent's general activity." *Id.* at 12 (citing *Brotherhood of Carpenters v. United States*, 330 U.S. at 410 ("The grant of authority to an officer of a union to negotiate agreements with employers * * * may well be sufficient to make the union liable.")).

As the union's authorized representative, Woodward was empowered to conduct the union's business at Yellow Bus. Since Woodward was the designated union presence on the site authorized to run the strike, his acts can be considered the union's acts for which the union is responsible. See *United Mine Workers of America v. Meadow Creek Coal Co.*, 263 F.2d 52, 63 (6th Cir.), *cert. denied*, 359 U.S. 1013 (1959) (high union official in charge of a strike and directly involved in its unlawful activity "was high enough in the hierarchy * * * to render [the] organization liable for the consequences of conduct of its members under his general leadership"). See also *Kayser-Roth Corp. v. Textile Workers Union of America*, 479 F.2d 524, 527-28 (6th Cir.), *cert. denied*, 414 U.S. 976 (1973) (acts of high officials in violation of state law deemed "participation" for purposes of union liability under § 6).

In sum, "[i]f a union delegates to an agent unrestricted authority going beyond the norms of union conduct, § 6 does not immunize it from liability for his illegal acts. Similarly, if it continues him in a previous position of high responsibility after knowledge of his illegal activities, § 6 affords no shelter." *Harlem River Consumers Coop., Inc. v. Associated Grocers of Harlem, Inc.*, 450 F.2d 271, 273-274 (2d Cir. 1971) (citing *Carpenters*, 330 U.S. at 409-410). The record supports that Local 639 both knowingly tolerated Woodward's acts and fully authorized Woodward to act. In either case, the jury verdict against the union comports with statutory requirements and should be upheld.

## III. JNOV on Abuse of Process and Intentional Interference With Contract

The jury awarded a total of $100,000 against Woodward and the Local for intentional interference with a contract between Yellow Bus and the Charles Smith Jewish Day School ("JDS"). The district court set aside this verdict, finding that Yellow Bus had failed to offer proof, "clear or otherwise", of causal connection between appellees' alleged conduct and the decision by JDS to terminate the contract. See *Tuxedo Contractors, Inc. v. Swindell-Dressler Co.*, 613 F.2d 1159, 1160 (D.C. Cir. 1979) (complainant must prove "contract, knowledge of contract, intentional procurement of its breach by defendant, and damages resulting from breach"). We agree with the district court and uphold its judgment notwithstanding the verdict.

First, Yellow Bus offered no evidence whatsoever of the Local's intent to procure a breach of this particular contract. Additionally, Yellow Bus completely failed to establish any link between the damage suffered during the strike and the subsequent cancellation of the JDS contract over one year later. The two factors precipitating the cancellation by JDS—Yellow Bus' tax lia-

bilities and inadequate service—had nothing to do with appellees' activities. Yellow Bus' difficulties with the IRS pre-dated the Local's involvement with the company. Abundant testimony linked the company's poor performance to lax employee discipline and the rapid deterioration of the company's stock of antiquated buses after the departure of its only skilled mechanic in the fall of 1982. A number of Yellow Bus' own witnesses admitted that these difficulties were not traceable to appellees' efforts or action. Since appellants failed to offer the most elementary evidence of any causal connection between the cancellation and the appellees' malefaction, the motion for a judgment notwithstanding the verdict was appropriately granted.

Appellants' objection to the grant of JNOV on abuse of process also has no merit. To prevail on abuse of process, a plaintiff must demonstrate that process is being used "to compel the party affected by it to do some collateral thing which he could not legally and regularly be compelled to do." *Hall v. Hollywood Credit Clothing Co.*, 147 A.2d 866, 868 (D.C. App. 1959). See also *Jacobson v. Thrifty Paper Boxes, Inc.*, 230 A.2d 710, 711 (D.C. App. 1967) (citing 1 Am. Jur. 2d *Abuse of Process* § 4 (1962)). Plaintiff must demonstrate not only ulterior motive, but success in achieving illegitimate ends with resulting injury. *Morowitz v. Marvel*, 423 A.2d 196, 198 (D.C. App. 1980) ("[I]n addition to ulterior motive, one must allege and prove that there has been a perversion of the judicial process and achievement of some end not contemplated in the regular prosecution of the charge."); *see also Hall v. Hollywood Credit Clothing Co.*, 147 A.2d at 868; *McCarthy v. Kleindienst*, 741 F.2d 1406, 1414 (D.C. Cir. 1984).

Appellants' abuse of process claim fails because one of the alleged ulterior aims is implausible, and the other was not achieved. The appellants claimed that Woodward sought to discover information vital to his criminal de-

fense and to coerce the company to make labor concessions. However, the fact that Woodward's lawyer did not commence discovery until after Woodward's criminal charges were dropped conclusively discredits discovery as an "ulterior motive". As for the coercive contract claim, Woodward responded to the company's resistance by abandoning the "collateral" demand that Yellow Bus agree to sign a collective bargaining agreement as a condition of settlement of Woodward's lawsuit. He eventually agreed to drop the action in exchange for $3,000. However, even if Woodward had initially commenced legal action to induce Yellow Bus to acquiesce in his labor demands, appellants suffered no actionable injury because Woodward did not *accomplish* this impermissible purpose. See *Morowitz v. Marvel*, 423 A.2d at 198 ("[W]ithout more, [the] proffer that [defendant] filed [a claim] with the ulterior motive of coercing settlement is deficient.") Moreover, the procurement of an "ordinary" settlement will not ground abuse of process; the settlement must accomplish some outrageous end and represent a "perversion" of the judicial process. See *id.* In sum, plaintiffs have failed to make out essential elements of their abuse of process claim. The district court's decision to set aside the jury award for abuse of process was appropriate.

## IV. RICO Complaint

In its original complaint, Yellow Bus alleged that the conduct of Woodward and the Local violated 18 U.S.C. §§ 1962(c) and (d) of the Racketeer Influenced and Corrupt Organizations Act and requested treble damages under 18 U.S.C. § 1964(c). Section 1962(c) makes it "unlawful for any person employed by or associated with any enterprise engaged in * * * interstate commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity." Section 1962(d) prohibits any conspiracy to violate subsection (c). Section 1961 (1)

and (5) of the statute define "racketeering activity" to include acts or threats involving murder, arson, and extortion punishable under state law. A "pattern" of such activity requires at least two acts occurring within ten years. 18 U.S.C. § 1961(4). The predicate acts which combine to produce the pattern of illegal activity must be marked by the factors of "continuity plus relationship." S. Rep. No. 617, 91st Cong., 2d Sess. 158 (1969). See also *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 496 n.14 (1985).

Yellow Bus listed ten predicate acts allegedly performed by the Local and Woodward in violation of D.C. and Maryland laws punishing extortion, including threats against property and threats of bodily harm. A careful examination of the pleadings reveals that five of the counts involve violence against property or persons unconnected with Yellow Bus or its labor organizing effort. These allegations are not properly part of Yellow Bus' § 1962(c) RICO claim against appellees. Of the remaining counts, four allege direct threats to Yellow Bus property or employees which qualify as offenses listed in the § 1961(1) definition of racketeering activity. Additionally, these predicate acts appear to fulfill the requirement for a "pattern"—"continuity plus relationship"—as stated in the Senate Report. The definition of "pattern" of conduct, provided by Congress later in the same bill, indicates that this term embraces "criminal acts that have the same or similar purposes, results, participants, victims, or methods of commission * * * and are not isolated events." 18 U.S.C. § 3575(e) (1982). See also *Sedima*, 473 U.S. at 496 n.14. Here, appellees are accused of engaging in acts of vandalism and intimidation during a specific time period in pursuit of a unitary goal. We believe this scenario meets the statutory requirements for a "pattern of racketeering activity."

Nevertheless, the district court, in two separate orders, dismissed the RICO complaints against appellees. The

count against the Local was dismissed because it designated the Local as both the RICO "person" and the RICO "enterprise", violating the requirement that these be separate and distinct entities under § 1962(c). The court refused to allow the appellants to cure this deficiency by amending the complaint to name Yellow Bus as the "enterprise", reasoning that the amended complaint would not state a valid RICO claim because the Local did not fulfill the statutory requirement of participation in the conduct of Yellow Bus' affairs. The court also indicated that the motion had "come too late." In a second order dismissing the RICO complaint against Woodward, the court relied on the now repudiated requirement of demonstrating a distinct "RICO injury"—injury different in kind from that occurring as a result of the predicate acts themselves. See *Sedima, S.P.R.L. v. Imrex Co.*, 741 F.2d 482 (2d Cir. 1984), *rev'd*, 473 U.S. 479 (1985).

While the trial in this case was proceeding, the Supreme Court reversed the Court of Appeals decision in *Sedima* by holding that RICO required no allegation of a separate "racketeering injury". See *Sedima*, 473 U.S. at 493-500. On the basis of this clarification, we conclude that the district court erred in dismissing the RICO cause of action against Woodward. Our conclusion that the dismissal of the RICO count against the Local was error requires more extensive analysis. At the outset, we agree with the district court that the designation of the Local as both the "enterprise" and the defendant "person" does not comport with statutory language or design. In refusing to permit amendment of the complaint because of the timing of the request, however, the court abused its discretion. A complaint amended to name Yellow Bus as the RICO "enterprise" would state a cognizable claim under § 1962(c), and that amendment should be permitted.

A. The "person" and the "enterprise" under § 1962(c)

Section 1962(c) is directed at "any person *employed by or associated with* any enterprise" who participates in the enterprise's affairs by racketeering. (emphasis added). All but one of the Courts of Appeals considering the question have required that the "person" and "enterprise" be different entities under this section. See, e.g. *Schofield v. First Commodity Corp.*, 793 F.2d 28, 30-31 (1st Cir. 1986); *Bennett v. U.S. Trust Co.*, 770 F.2d 308, 315 (2d Cir.), *cert. denied*, 474 U.S. 1058 (1986); *Haroco, Inc. v. American Nat'l Bank & Trust Co.*, 747 F.2d 384, 399-402 (7th Cir. 1984); *but see United States v. Hartley*, 678 F.2d 961, 989-90 (11th Cir. 1982); *Bergen v. Rothschild*, 648 F. Supp. 582, 589 (D.D.C. 1986) (allowing identity of person and enterprise partnership). *See generally*, Enterprise: Relation of Liable Person, 5 RICO L. Rep. 364-365 (1987).

In perceiving and justifying this requirement, the courts rely on both the language of the provision and the policy behind the act. Logic alone dictates that one entity may not serve as the enterprise and the person associated with it because, as Judge Posner of the Seventh Circuit has stated, "you cannot associate with yourself." *McCullough v. Suter*, 757 F.2d 142, 144 (7th Cir. 1985). The majority rule also reflects Congress' apparent decision in § 1962(c) to target criminal activity of a particular kind—the exploitation and appropriation of legitimate business by corrupt individuals. Congress was aware that organized crime often operates by infiltration of legitimate enterprises through a pattern of racketeering activity. See S. Rep. No. 617, 91st Cong., 1st Sess. 76-78 (1969). In considering the intention of the provisions' drafters, courts have reasoned that section 1962(c) was intended to punish the person who conducts the affairs of an otherwise legitimate business in an illegal manner. "Such a distinction focuses the section on the culpable party and recognizes that the enterprise it-

self is often a passive instrument or victim of the racketeering activity." *Bennett v. U.S. Trust Co.*, 770 F.2d at 315. Allowing identity of person and enterprise would permit punishment of the exploited "victim" enterprise as well as the infiltrator person or entity. This consequence is both unintended and undesirable.

Under the rule requiring distinct entities, however, § 1962(c) liability usually cannot be imposed on those organizations created solely for illegal purposes and operated to the detriment of third parties by corrupt directors or controlling partners. Consequently, an exception to the non-identity rule has at times been made for the institution that functions as both "perpetrator" and "victim." See e.g., *United States v. Hartley*, 678 F.2d at 989 (because plaintiff could have named culpable corporate directors as defendant "association-in-fact" distinct from corporate enterprise, court "pierced the corporate veil" to allow corporation to be named as both defendant and enterprise).

It is important to realize, however, that corrupt organizations which conduct their own affairs by illegal means may often be subject to direct liability under another section of RICO. Section 1962(a) prohibits the receipt and subsequent investment of racketeering proceeds into an "enterprise". Under this section—which does not contain the language of subsection (c) implying that the person and enterprise must be distinct—a number of courts have rejected a non-identity requirement. At least three Courts of Appeals have concluded that "a corporation-enterprise may be held liable under subsection (a) where the corporation is also a perpetrator" and not merely a passive instrument of the racketeering activity. See *Haroco*, 747 F.2d at 402 (7th Cir.); *Schofield*, 793 F.2d at 31 (1st Cir.). See also *Schreiber Distributing Co. v. Serve-Well Furniture Co.*, 806 F.2d 1393, 1398 (9th Cir. 1986) (allowing corporation that is the "direct or indirect beneficiary" of pattern of rack-

eteering activity to be both "person" and "enterprise" under 1962(a)). When interpreted in this way, section 1962(a) provides one mechanism to punish such corrupt organizations by depriving them of their ill-gotten gains.

It is thus apparent that the language of each section contemplates a different role the enterprise may play in a variety of corrupt schemes. See *Haroco*, 747 F.2d at 401 (Under the respective subsections of 1962, "the enterprise may play the various roles of victim, prize, instrument, or perpetrator. The RICO liability of the enterprise should depend on the role played.") Through section (a), Congress provided for punishment of organizations which in fact gain from their wrongdoing by focusing on profits gleaned from illegal activities, thus "sparing" organizations that do not so profit. Section (c) likewise immunizes organizations which are merely "victims", but this result depends on the requirement of non-identity of person and enterprise which also places some corrupt organizations beyond reach. The use of (c) to impose liability on some types of organizations covered by (a) carries the danger of exposing innocent organizations to prosecution. Absent the non-identity requirement, *respondeat superior* could operate to impose § 1962 (c) liability on a corporation that is unaware of the racketeering activities of its agents and has not been enriched by those activities. Since we agree with the court in *Schofield*, 793 F.2d at 32, that "the concept of vicarious liability is directly at odds" with the Congressional intent behind § 1962(c), we think it wise not to risk this consequence by disturbing Congress' carefully crafted scheme. We therefore hold with those courts that forbid identity of person and enterprise under § 1962(c) and conclude that the original complaint naming the Local as person and enterprise was properly dismissed.

Yellow Bus attempts to avoid this legal result by depicting the RICO enterprise as an "association-in-fact"

comprised of the Local and Woodward, an entity distinct from each of these named defendants. This attempt is unavailing. It is true that under the expansive § 1961 definition of "enterprise", some courts have permitted the enterprise to be defined as an association composed of some number of the distinct individual defendants or defendant corporations. See *Cullen v. Margiotta*, 811 F.2d 698, 729-730 (2d Cir.), *cert. denied sub nom. Nassau County Republican Committee v. Cullen*, 107 S.Ct. 3266 (1987) ("[W]e see no reason why a single entity could not be both the RICO 'person' and one of a number of members of the RICO 'enterprise.' "); *Fustok v. Conticommodity Services, Inc.*, 618 F. Supp. 1070, 1076 (S.D.N.Y. 1985) (group of individual corporate defendants may qualify as "association-in-fact" enterprise); *see also United States v. Perholtz*, 657 F. Supp. 603, 605 (D.D.C. 1986); *but cf. Beck v. Cantor Fitzgerald & Co.*, 621 F. Supp. 1547, 1563 (N.D. Ill. 1985) (association of defendants may constitute an 'enterprise' only if that enterprise has a "separate and sufficiently lasting identity apart from the 'person' or 'persons' * * * who are employed [by] or associated with it.") Several courts, however, have disallowed a § 1962(c) claim where the relationship among the members of the enterprise association is the relationship of parts to a whole. That is, while the corporate or organizational defendant may itself be a member of the enterprise association, the members of the enterprise association may not simply be subdivisions, agents, or members of the defendant organization. See *Hanline v. Sinclair Global Brokerage Corp.*, 652 F. Supp. 1457, 1462 (W.D. Mo. 1987) (enterprise association of corporation with its employees not distinct from corporation defendant); see also *Atkinson v. Anadarko Bank & Trust Co.*, 808 F.2d 438, 441 (5th Cir), *cert. denied*, 107 S. Ct. 3276 (1987) (bank, holding company, and three employees have no distinct existence apart from defendant bank); *Tarasi v. Dravo Corp.*, 613 F. Supp. 1235, 1236-37 (W.D. Pa. 1985) (corporate de-

fendant may not be associated with its agent to form 1962(c) enterprise).

In short, an organization cannot join with its own members to do that which it normally does and thereby form an enterprise separate and apart from itself. Where, as here, the organization is named as defendant, and the organization associates with its member to form the enterprise "association-in-fact", the requisite distinctness does not obtain. As the district court pointed out, there is no difference between the union as an entity including Woodward as officer, and the union plus Woodward, since "the whole is no different than the sum of its parts in this context." Furthermore, allowing plaintiffs to generate such "contrived partnerships" consisting of an umbrella organization and its subsidiary parts, would render the non-identity requirement of section 1962(c) meaningless. We decline to permit such an "end run" around the statutory requirements.

B. "Participate in the conduct of the affairs"

The district court rejected Yellow Bus' attempt to charge the local as a RICO defendant under § 1962(c) by amending the complaint to name itself as the "enterprise". In addition to objecting to the timing of the request, the court concluded that the amended complaint would fail to state a proper RICO claim because the union's acts were not committed in the conduct of Yellow Bus' affairs; rather, Yellow Bus was merely the "setting" for the union's activities. We disagree with the district court's assessment of the relationship between the bus company and the Local's alleged conduct, and reject as overly restrictive any interpretation of the language of § 1962(c) which would necessitate a dismissal of the RICO claim against the Local in this case.

Unlike "enterprise" and "pattern", the terms "conduct", "participate" and "through" do not have statutory definitions. The Act has been challenged as unconstitu-

tionally vague for this reason. See *United States v. Stofsky*, 409 F. Supp. 609 (S.D.N.Y. 1973). In rejecting the vagueness argument the court in *Stofsky* explained:

> The statute does not define [the] connection by distinguishing between predicate acts which play a major or a minor role, or any role at all in what might seem as the usual operation of the enterprise; nor does it require that such acts be in furtherance of the enterprise, as defendants suggest it must.
>
> In this Court's view, the statute fails to state these requirements because Congress did not intend to require them in these terms. The perversion of legitimate business may take many forms. The goals of the enterprise may themselves be perverted. Or the legitimate goals may be continued as a front for unrelated criminal activity. Or the criminal activity may be pursued by some persons in direct conflict with the legitimate goals, pursued by others. Or the criminal activity may, indeed, be utilized to further otherwise legitimate goals. No good reason suggests itself as to why Congress should want to cover some, but not all of these forms; nor is there any good reason why this Court should construe the statute to do so. It plainly says that it places criminal responsibility on both those who conduct and those who participate, directly or indirectly, in the conduct of the affairs of the enterprise, without regard to what the enterprise was or was not about at the time in question. This may be broad, but it is not vague.

*Id.* at 613. Thus, in *Stofsky*'s view, the "requisite nexus" between unlawful acts and enterprise activities was left undefined "for the simple reason that no particular degree of interrelationship is required." *United States v. Field*, 432 F. Supp. 55, 58 (S.D.N.Y. 1977) (citing *Stofsky*).

Notwithstanding *Stofsky*'s refusal to clarify the reach of § 1962(c), courts have struggled to define the scope of

behavior chargeable under that section. Attempts have been made to formalize the intuition that § 1962(c) was not meant to punish predicate activity which forms no part of the ordinary affairs of the enterprise, and is only incidentally related to its day-to-day business. See, e.g., *U.S. v. Yonan*, 623 F. Supp. 881, 883 (N.D. Ill. 1985), *aff'd in part and rev'd in part*, 800 F.2d 164 (7th Cir. 1986) (seeking a test for "association" and "participation" to disqualify, for example, "robbing a bank twice"). Some federal courts have required that the defendant participate in the "direction" or "management" of the organization, or have fashioned other rules to restrict the universe of relationships subject to § 1962(c) liability. See, e.g. *Bennett v. Berg*, 710 F.2d 1361, 1364 (8th Cir.), *cert. denied sub nom. Prudential Ins. Co. v. Bennett*, 464 U.S. 1002 (1983) ("[S]ome participation in the operation or management of the enterprise itself" is ordinarily required); *Bank of America v. Touche Ross & Co.*, 782 F.2d 966, 970 (11th Cir. 1986) (chargeable predicate acts must be "helpful or necessary" to the operation of the enterprise); *United States v. Ladmer*, 429 F. Supp. 1231, 1244 (E.D.N.Y. 1977) (dismissing a RICO charge based on unauthorized expenditure of union funds for personal travel expenses because unrelated to the enterprise's "essential" or "core" function).

Other federal courts, however, merely impose an open-ended requirement that the predicate acts relate to, or have some effect upon, the affairs of the enterprise. See, e.g., *United States v. Welch*, 656 F.2d 1039, 1060-62 (5th Cir. 1981), *cert. denied sub nom. Cashell v. U.S.*, 456 U.S. 915 (1982) (holding that 1962(c) requires a "sufficient nexus between the racketeering activities and the affairs of the enterprise" and rejecting the requirement of "benefit" to the enterprise); *United States v. Carter*, 721 F.2d 1514, 1525-27 (11th Cir.), *cert. denied sub nom. Morris v. U.S.*, 469 U.S. 819 (1984) (allowing "proof of effect on the common everyday affairs

of the enterprise"). In *United States v. Scotto*, 641 F.2d 47, 54-55 (2d Cir. 1980), *cert. denied*, 452 U.S. 961 (1981), union officials were accused of forgiving contract requirements and steering business in exchange for illegal payoffs. The court refused to embrace the "core functions" formula of *Ladmer*, or the *Berg* requirement that the conduct relate to the operation or management of the enterprise. Citing with approval to the district court decision in *United States v. Stofsky*, the *Scotto* court fashioned a two part test for "conducting the activities of an enterprise", holding that the proper connection is established when "1) one is enabled to commit the predicate offenses solely by virtue of [one's] position in the enterprise or involvement in or control over the affairs of the enterprise, or 2) the predicate offenses are related to the activities of that enterprise." *Id.* at 54. The court went on to note that "[s]imply committing predicate acts which are unrelated to the enterprise or one's position within it would be insufficient." *Id.* Another Court of Appeals restated the *Scotto* test in *United States v. Cauble*, 706 F.2d 1322 (5th Cir. 1983), *cert. denied*, 465 U.S. 1005 (1984), finding the demands of § 1962(c) satisfied when "the defendant's position in the enterprise facilitated his commission of the racketeering acts" and "the predicate acts had some effect on the lawful enterprise." *Id.* at 1333. *See also United States v. Provenzano*, 688 F.2d 194, 200 (3rd Cir.), *cert. denied*, 459 U.S. 1071 (1982) (following *Scotto*).

We decline to adopt a more restrictive standard than that enunciated in *Cauble* and *Scotto*. Section 1962(c) of RICO refers to direct as well as indirect participation in the enterprise's affairs, and imposes no requirement that participation be at the management level or relate to "core functions". Moreover, Congress has expressed its intention that RICO be "liberally construed to effectuate its remedial purposes." Pub. L. No. 91-452, § 904(a), 84 Stat. 947 (1969). The inappropriateness of artificially

restricting the types of relationships satisfying § 1962 (c) is especially apparent in cases of predicate acts committed by enterprise "outsiders" rather than "insiders". In such instances, a stringent test threatens to frustrate RICO's broad remedial purpose. See *United States v. Elliott*, 571 F.2d 880, 903 (5th Cir.), *cert. denied sub nom. Delph v. United States*, 439 U.S. 953 (1978) ("The substantive proscriptions of the RICO statute apply to insiders *and outsiders*—those merely 'associated with' an enterprise—who participate directly *and indirectly* in the enterprise's affairs. [Citations omitted.] Thus the RICO net is woven tightly to catch even the smallest fish, those peripherally involved with the enterprise.")

Mindful of these flexible terms, a number of courts have permitted RICO actions in bribery cases against those seeking to influence organizations in which they hold no official position of authority. See, e.g., *United States v. Forsythe*, 560 F.2d 1127, 1136 (3rd Cir. 1977) (reversing a lower court holding that a magistrate who accepts bribes from a bonding company is not sufficiently "associated with" the bonding company enterprise's affairs). See also *United States v. Bright*, 630 F.2d 804, 830 (5th Cir. 1980) (holding that bribing and influencing a sheriff qualified as participation in the affairs of the sheriff's office); *United States v. Lee Stoller Enterprises*, 652 F.2d 1313, 1320-21 (7th Cir.), *cert. denied*, 454 U.S. 1082 (1981) (businessman paying kickbacks to sheriff in exchange for lucrative contracts held to participate in sheriff's office affairs); *United States v. Blackwood*, 768 F.2d 131, 137-38 (7th Cir.), *cert. denied*, 474 U.S. 1020 (1985) (applying *Cauble* to allow § 1962(c) RICO charge against a police officer charged with soliciting bribes to influence county court case disposition); *United States v. Yonan*, 800 F.2d 164, 167 (7th Cir. 1986), *cert. denied*, 107 S. Ct. 930 (1987) (reversing the dismissal of a RICO count against a criminal defense attorney charged with bribing a state district attorney).

The *Yonan* court stressed that defendant need not have a stake or ongoing interest in the enterprise, nor any direct contact with managers of the enterprise, as long as the predicate acts formed part of a "business relationship." *Id.* at 168. In a context not involving official corruption, the court in *State of New York v. O'Hara*, 652 F. Supp. 1049, 1053-54 (W.D.N.Y. 1987), applied the analysis in *Yonan* to uphold a RICO claim against a private contractor who allegedly submitted fraudulent bids on a municipal waste clean-up contract. The court held that this activity fulfilled the statutory requirement of association with the City of Niagara Falls through indirect participation in its affairs. See also *United States v. Starnes*, 644 F.2d 673, 679 (7th Cir.), *cert. denied*, 454 U.S. 826 (1981) (arsonist hired by company official to "torch" its headquarters "associates with" and "participates" in the company's affairs under § 1962(c)).

The alleged relationship between the Local and Yellow Bus falls well within the scope of activity contemplated by the words of the statute, and meets the appropriately minimal requirements set out in *Scotto*, *Cauble*, and *Yonan* and their progeny. As in *Yonan*, Yellow Bus and the union had a full-fledged "business relationship"—Yellow Bus was not merely a "setting" for crimes otherwise unrelated to the company's affairs. As we have shown, it matters not that Woodward and the Local did not direct or manage the "core" day-to-day transportation activities of Yellow Bus, or that the union initially exerted its influence over the conduct of employees, rather than management. A strike for recognition of the union as a collective bargaining representative is an activity sufficiently related to the company's ongoing role as a business enterprise and employer to establish the requisite nexus. Although the Local and the bus company were associated for a limited period, their relationship had vital significance for the economic destiny of Yellow Bus. The elaborate legal structure which governs all as-

pects of management-labor interaction only serves to emphasize that a strike by a union seeking to bargain with an employer is an important "affair" of the employer company. More often than not, it is a momentous event in the life of that enterprise.

Having established that the strike and organizational effort were "affairs" of Yellow Bus, we must decide whether appellees' actions, if proved, would amount to participation in the conduct of those affairs "*through* a pattern of racketeering activity." Yellow Bus alleges that the violence was committed with the intent to influence the company's conduct. Allegations of a requisite number of intentional destructive acts or threats during the strike would alone satisfy the participation requirement for the purpose of *stating* a RICO claim. Any further showing of success in influencing concrete company choices through violent extortion is unnecessary. In contending that appellees chose to avail themselves of violent tactics as one way of conducting the strike, Yellow Bus charges that appellees participated in the conduct of the company's affairs for the duration of the strike by means of these activities, among others. This clearly serves to fulfill the requirement of participation in the affairs of the company.

## V. Rule 15(a) Leave to Amend

Finally, we hold that the district court abused its discretion to the extent that it relied on lack of timeliness to justify its refusal of leave to amend. Fed. R. Civ. P. 15(a) declares that leave to amend "shall be freely given when justice so requires". As the Supreme Court forcefully stated in *Foman v. Davis*, 371 U.S. 178, 182 (1962), "this mandate is to be heeded." These pleading rules were designed to facilitate a proper decision on the merits, and the opportunity to test the merits should ordinarily be accommodated if injustice will not otherwise result. See generally 6 C. Wright & A. Miller, *Federal Practice and Procedure* § 1484 (1971).

The reasons recognized as justifying denial of motion to amend—"undue delay, bad faith or dilatory motive * * * , repeated failure to cure deficiencies * * * , undue prejudice to the opposing party * * * , futility of the amendment," 371 U.S. at 182—are not applicable here. Only two months elapsed between the March 31, 1984 hearing at which the court first expressed doubts about the deficiencies of the original pleadings and Yellow Bus' request to amend those pleadings. When the court ruled in late June on the Local's April 13 motion to dismiss the original RICO claim against the union, commencement of trial was still over eight months away. Consideration of this timetable indicates that Yellow Bus moved with more than reasonable alacrity to correct its pleadings, and that ample time was available to defendants for trial preparation. Amendment of the complaint, in any event, would not have imposed any additional burdens on the Local because the restated RICO claim required consideration of no new facts and arguments. Since there was no evidence of prejudice to appellees or of deliberate delay or bad faith, leave to amend was appropriate and should have been granted.

## CONCLUSION

We remand to the district court for a trial on the RICO charges after Yellow Bus has had the opportunity to lodge revised pleadings. We also reinstate the judgment against the Local for malicious destruction of property. After considering the remaining contentions on appeal, we find them to be without merit. Accordingly, the judgment of the district court is affirmed in part and reversed in part, and the case is remanded to the district court for further proceedings.

EDWARDS, *Circuit Judge concurring*: I have nagging doubts about our holding that "the strike and organizational effort were 'affairs' of Yellow Bus," maj. op. at 23, and that, consequently, plaintiff might be able to state a cause of action under section 1962(c) of RICO. This result seems strangely at odds with certain fundamental precepts of labor law and collective bargaining. However, I recognize that this holding finds support in the case law, and that it is not inconsistent with RICO's broad remedial purpose. I therefore concur, albeit with pause.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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Civil Action No. 82-3154

JAMES F. WOODWARD,
*Plaintiff,*

v.

MICHAEL DIPALERMO, *et al.*,
*Defendants.*

---

Civil Action No. 83-1232

YELLOW BUS LINES, INC., *et al.*,
*Plaintiffs,*

v.

DRIVERS, CHAUFFEURS & HELPERS,
LOCAL UNION 639, *et al.*,
*Defendants.*

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[Filed Jan. 16, 1986]

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JUDGMENT

After consideration of defendants' motion for judgment notwithstanding the verdict, or alternatively, for modification of the judgment or for a new trial, the opposition thereto, and the entire record herein, it is, by the court, this 16th day of January, 1986,

ORDERED, ADJUDGED, and DECREED that the motion for judgment notwithstanding the verdict is

granted with regard to defendant Drivers, Chauffeurs & Helpers Local Union 639 and judgment is entered in favor of defendant Drivers, Chauffeurs & Helpers Local Union 639 on all counts; and it is further

ORDERED, ADJUDGED, and DECREED that the motion for judgment notwithstanding the verdict is granted with regard to defendant James Woodward on the counts of tortious interference with contractual relations and abuse of process, and judgment is entered in favor of James Woodward on those counts; and it is further

ORDERED, ADJUDGED, and DECREED that the motion for judgment notwithstanding the verdict is denied with respect to defendant James Woodward on the count of malicious destruction of property, as is defendants' alternative motion for modification of the judgment or for a new trial; and it is further

ORDERED, ADJUDGED and DECREED that judgment be entered in favor of Yellow Bus Lines, Inc. against James Woodward in the amount of $1,280.00.

/s/ Thomas A. Flannery
United States District Judge

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[Filed Jan. 16, 1986]

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## MEMORANDUM

In this case, a jury returned a verdict in favor of plaintiffs on three counts: malicious destruction of property, intentional interference with contractual relations, and abuse of process. In response to a special verdict form, the jury awarded damages of approximately $56,000 against defendant James Woodward and approximately $77,000 against defendant union. This mat-

ter now comes before the court on defendants' motion for judgment notwithstanding the verdict, or alternatively, for modification of the judgment or a new trial. Because the verdicts are obviously against the clear weight of the evidence on the counts alleging intentional interference with contractual relations and abuse of process, the court will set aside the jury verdicts in favor of plaintiffs on those counts, and enter judgments notwithstanding the verdicts in favor of the defendants. On the count alleging malicious destruction of property, the court will modify the verdict.

I. *Background*

Plaintiff Yellow Bus Lines Inc. ("Yellow Bus") was a Virginia corporation located in the District of Columbia and engaged in providing bus service for schools. In November of 1981, some eight employees of Yellow Bus struck for recognition of defendant Drivers, Chauffeurs & Helpers Local Union 639 ("Local 639"). Defendant Woodward was the Local 639 representative who sought to organize the employees and to establish Local 639 as their collective bargaining representative.

Though the company continued to operate throughout a four-day strike in November of 1981, plaintiffs contended that Local 639 and Woodward engaged in a systematic campaign to undermine the company. This was allegedly done during the strike by encouraging employees to commit various acts of vandalism and after the strike by instructing the employees to damage property and be late or absent. Plaintiffs alleged that Woodward threatened Yellow Bus managers that if Yellow Bus resisted unionization, then litigation and other tactics would be used to hurt Yellow Bus. The labor dispute continued after the strike, and in the summer of 1983, Yellow Bus discontinued most of its operations, alleging that defendants' activities caused its demise.

Proceedings in this court were initiated on November 4, 1982, when Woodward filed a suit alleging false arrest against D.C. police officer Michael DiPalermo, the District of Columbia, and Yellow Bus. Plaintiffs counterclaimed with federal and state claims in April of 1983 against Woodward and Local 639. By October 1984, this court had dismissed all of the federal claims, but elected to retain jurisdiction over the state claims. In May of 1984, Woodward's claim for false arrest was settled with the District of Columbia and was dismissed against Yellow Bus on Woodward's motion to dismiss.

On February 18, 1985, trial commenced on the remaining claims. On March 8, 1985, a verdict was returned in favor of plaintiffs on three counts. Defendants now contend that notwithstanding the jury's verdict, judgment should be granted defendants because there was insufficient proof on each count.

Judgment notwithstanding the verdict should be entered when "the evidence, together with all inferences that can reasonably be drawn therefrom, is so one-sided that reasonable men could not disagree on the verdict." *Coburn v. Pan American World Airways, Inc.*, 711 F.2d 339, 342 (D.C. Cir. 1983). Of course, only when the probative facts are undisputed and reasonable minds can draw but one inference does the question become one of law for the court. *Aylor v. Intercounty Constr. Corp.*, 381 F.2d 930, 934 (U.S. App. D.C. 1967). An additional element in the standard of review exists in this case: by federal law, no union, agent or member of a union shall be held liable in any court for the unlawful acts of individual officers or members except upon "clear proof of actual participation in, or actual authorization of, sch acts. . . ." 29 U.S.C. § 106 (1982).

The counts and the evidence supporting them are each discussed separately.

II. *Interference with Business Contract*

The largest portion of the jury's award (cumulatively $100,000) was based on a finding that defendants intentionally interfered with the 1982-83 contract between Yellow Bus and the Charles Smith Jewish Day School ("JDS"). In order to prevail on this claim, there must be clear proof of a specific intent to procure the breach of a specific contract thereby causing a specific and ascertainable injury. *Tuxedo Contractors, Inc. v. Swindell-Dressler Co.*, 613 F.2d 1159 (D.C. Cir. 1979).

The only specific contract mentioned at trial was between Yellow Bus and JDS, which was entered into in October of 1982. The Chairman of the JDS Transportation Committee, Howard Wilchins, testified without impeachment that JDS's difficulties with Yellow Bus occurred almost one year after the strike, after the contract was negotiated in October of 1982. Transcript, at 1507, 1508. It was in January of 1983 that JDS took action to curtail the contract because of Yellow Bus' poor service. Transcript, at 1509. But even then the contract continued. It was only when the president and route manager of Yellow Bus, Paula Westgate, informed JDS of Yellow Bus' financial problems with the IRS that Wilchins terminated the contract. Transcript, at 1511; Defendants' Exhibit 22.

This court finds that there is no proof, clear or otherwise, of a causal connection between defendants' alleged conduct and the termination of the contract. The two reasons for termination of the contract were Yellow Bus' poor performance and its difficulty with the IRS. Transcript, at 921, 1513. Neither of these arose from defendants' activities. The plaintiffs also had to prove that defendants intentionally produced a breach of the contract, yet there was no evidence supporting this element.

While driver attendance may have been a problem, Paula Westgate admitted at trial that defendants were

not responsible for the problems of an overwhelming majority of drivers. In fact, all of plaintiffs' witnesses admitted that they had no proof of defendants' responsibility for any of the drivers' abstenteeism, tardiness, or maintenance problems. Rather, the evidence showed that the company had significant drug and alcohol problems, and had internal problems among the three owners: Paula Westgate, Maria Triggs (secretary-treasurer and office manager), and Peter McKinnon (vice president and company mechanic). In fact, McKinnon at one point attempted to destroy the company, declared he was Christ, and threatened to murder Westgate, his sister. Moreover, no evidence was introduced at trial that any of the vandalism occurred after the allegedly affected contract was executed.

There was also no evidence that defendants were responsible for the company's tax liabilities. Maria Triggs testified that the company had difficulty paying its taxes from its inception. The obligations stemmed from the company's withholding FICA and social security deductions from employees, but then not remitting the deducted amounts to the federal government. This practice began June of 1981, before the union ever started negotiating with Yellow Bus.

The evidence pointed to a different cause for Yellow Bus' poor performance after the execution of the 1982-83 contract with JDS: the deterioration of the buses. Transcript, at 1110-1111, 1509. That deterioration came about from the age of the buses: Yellow Bus never bought a new bus and every model was a 1971 or earlier model. Transcript at 578-579, 586-587. By January 1983, half of the buses owned by Yellow Bus were inoperable. Transcript, at 361. After McKinnon departed in the fall of 1982 there was no one skilled enough to keep the buses running. Transcript, at 1111. This was when JDS sent several complaints to Yellow Bus. Transcript of 1983, the school reduced the number of Yellow

Bus routes, Transcript, at 1508-09, but the school intended to continue its contractual relationship with Yellow Bus. Transcript, at 1510. Only when JDS learned of Yellow Bus' tax liability to the IRS did JDS terminate the Yellow Bus contract. Transcript 1511-13, 1137, and 938.

Finally, there was no clear proof of the damages suffered as a consequence of the alleged interference. The award of $100,000 is not supported by any specific evidence in the record; this single contract could not have generated such profits. First, it only generated approximately $2,232 of gross income per day for a term of 183 school days per year. Second, the contract was totally performed for the first five months and there was 80% performance for the next two months. Defendants' Exhibit 21. This only leaves lost profits from two routes for two months (*grossing* approximately $10,400) and all routes for two months (*grossing* approximately $49,250). After subtracting cost of performance, this leaves a figure nowhere near $100,000.

Plaintiffs respond that Triggs and Westgate's testimony, supported by the company's tax returns, showed that the company's profits went from approximately $3,000 the first year to approximately $20,000 the second year. Though the buses were old, the company almost tripled its business from 1979 to 1981. After the strike, absenteeism increased due to the union activity. Plaintiffs' Exhibit 19(a). That increase led to losses of $128,517. Plaintiffs' Exhibits 17 and 19(d). Even if this were so, such damages are not tied to the contract in issue for 1982-83, and therefore cannot be used to determine compensation on that count.

Thus, plaintiffs have failed to show intentional procurement of a breach since they failed to demonstrate that defendants' actions contributed in any way to JDS's decision to terminate the contract. Further, plaintiffs'

evidence provided an inadequate showing of damages from the breach. Therefore, this court must set aside the verdict on this count and grant judgment to defendants.

III. *Abuse of Process*

To prove abuse of process, plaintiffs had to show: (1) the issuance of legal process; (2) an ulterior purpose; (3) an improper act in the use of process; and (4) actual injury. *Jacobsen v. Thrifty Paper Boxes, Inc.*, 230 A.2d 710, 711 (D.C. App. 1967).

Element (1) was not in dispute. With regard to elements (2) and (3), plaintiffs alleged that Woodward filed his lawsuit to gain information pertaining to his impending criminal trial and that Woodward offered to withdraw the suit if the company would pay its drivers five dollars per hour. In this action, plaintiffs' burden was to show by clear proof that Woodward's suit against plaintiffs resulted in a perversion of the judicial process and achieved some end not regularly contemplated by the law. *Morowitz v. Marvel*, 423 A.2d 196, 198 (D.C. 1980). Such perversion requires a gross deviation from what is considered acceptable by the community. *Epps v. Vogel*, 454 A.2d 320, 324 (D.C. 1982).

This court finds that no reasonable trier could find on this evidence that an abuse of process occurred. Woodward testified without contradiction that his attorney alone made the decisions as to when and how to pursue discovery in Woodward's case. The discovery never actually occurred, at plaintiffs' request, until *after* the criminal case was dismissed. Sufficient evidence came out at trial regarding the peculiarities of Woodward's arrest which refute any finding of "perversion" in the filing of his suit. In Woodward's civil suit for false arrest, co-defendants with Yellow Bus settled the case for more than three thousand dollars ($3,000). This is fur-

ther proof that there was no basis for a jury finding that Woodward's filing of his civil suit resulted in a perversion of the judicial process.

IV. *Malicious Destruction of Property*

To find malicious destruction of property, the jury had to find clear proof that: (1) it was defendants that destroyed the property; (2) it was not the property of the defendants; (3) defendants destroyed the property maliciously; and (4) the property destroyed had some value. *Nichols v. United States*, 343 A.2d 336, 341 (D.C. 1975).

The jury found that these elements had been met and so awarded to Yellow Bus $1,280 against Woodward and $1,920 against Local 639. During the four-day strike in November of 1981, there was sufficient evidence to find defendant Woodward liable for damages sustained during that four-day period. There was circumstantial evidence linking Woodward to the various items introduced into evidence, such as rocks, strips of wood and a curtain rod both with nails protruding, and a beer can with nails in it. These items of physical evidence coupled with the threats by Woodward and other strikers made in Woodward's presence provide a sufficient evidentiary basis for the jury to hold Woodward responsible for the damages sustained during the period of the four-day strike. The plaintiffs failed, however, to provide clear proof that Local 639 was implicated in any way in the destruction of the property or that it ratified Woodward's actions in any manner. Therefore, the judgment against Local 639 must be set aside. Defendant Woodward's motion to set aside the verdict against Woodward on the count will be denied.

Judgment will be entered in accordance with the foregoing.

/s/ Thomas A. Flannery
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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Civil Action No. 82-3154

JAMES F. WOODWARD,
*Plaintiff,*

v.

MICHAEL DIPALERMO, *et al.*,
*Defendants.*

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Civil Action No. 83-1232

YELLOW BUS LINES, INC.,
*Plaintiff,*

v.

DRIVERS, CHAUFFEURS & HELPERS
LOCAL UNION 639, *et al.*,
*Defendants.*

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[Filed June 28, 1984]

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## MEMORANDUM

This matter came before the court on several pretrial motions. By Order dated June 1, 1984, the court ruled on all outstanding motions so that the parties could intelligently prepare for the upcoming trial. The purpose of this Memorandum is to set forth the court's reasons for its rulings on the dispositive motions.[1]

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[1] In its June 1, 1984 Order, the court also affirmed Magistrate Dwyer's Order regarding Yellow Bus' use of Mr. David Stamp as a new expert witness. Yellow Bus appealed from the Magistrate's

## GENERAL BACKGROUND

The events underlying the claims and counterclaims filed in this case occurred in the Fall of 1981, during an attempt by the Drivers, Chauffers & Helpers Local Union 639 ("Local 639" or "union") to organize the employees of the Yellow Bus Lines, Inc. Local 639, allegedly through its business agent James Woodward, allegedly staged a strike at Yellow Bus as part of an attempt to gain recognition as exclusive bargaining agent for Yellow Bus' employees. During the course of the strike and thereafter, both sides allegedly made threatening remarks, various acts of violence were allegedly committed, and Woodward was allegedly arrested without cause. The labor dispute continued after the strike, and in the summer of 1983 Yellow Bus discontinued most of its operations, alleging that the union's activities caused its demise.

Proceedings in this court were initiated on November 4, 1982, when Woodward filed a suit against three Yellow Bus officers, the District of Columbia, and a D.C. police officer who allegedly caused Woodward's unlawful arrest after the strike, *see* Complaint in *Woodward*, Civ. Act. No. 82-3154. Woodward alleged that his federal constitutional and statutory rights were violated by the defendants, acting together, when they caused him to be arrested in order to stop his union activities. Yellow Bus' officers filed a compulsory counterclaim against Woodward for intentional infliction of emotional distress and abuse of process, and the court permitted the addition of Local 639 as co-plaintiff/counter-defendant and the assertion of these counterclaims against both Woodward and Local 639, *see* May 5, 1983 Order in *Woodward*.

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Order, but the appeal was denied on the ground that the Magistrate's Order was not clearly erroneous. It does not appear to this court that Yellow Bus will suffer substantial prejudice if it is not permitted to use Mr. Stamp as an expert, and Yellow Bus' attempt to substitute a new expert well past the deadline established by the court was therefore properly denied.

Further, the court permitted Yellow Bus to intervene as a defendant/counter-plaintiff, and to file counterclaims against Woodward and Local 639 for malicious destruction of property and interference with contractual relations, *see id.* At about that time, Yellow Bus filed a separate suit against Woodward and Local 639, wherein it alleged federal RICO violations, a secondary boycott claim, malicious destruction of property (again), interference with contractual relations (again), and abuse of process against both defendants, *see* Complaint in *Yellow Bus*, Civ. Act. No. 83-1232. On June 7, 1983, this court consolidated the *Woodward* and *Yellow Bus* cases. On July 25, 1983, the court granted Woodward's motion to dismiss the *Yellow Bus* secondary boycott claim against him,[2] but denied his motion with respect to the RICO claim and the pendent tort claims.

## DISCUSSION

### A. *Motions to dismiss Woodward's claims*

On May 16, 1984, James Woodward, the plaintiff in the original *Woodward* action, represented through a motion filed by Local 639 that his original claims against the District of Columbia and police officer DiPalermo had been settled. Woodward, Local 639, and counsel for the District and DiPalermo represented in this motion and later at a hearing that they all wished to see Woodward's original claims dismissed in light of the settlement. At the May 31, 1984 hearing, Woodward, appearing *pro se*, also moved to dismiss his claims against the Yellow Bus officers. By these two motions, then, Woodward sought to remove himself as a plaintiff in this case by dismissing all of his original claims in *Woodward*.

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[2] The court notes that in its June 1, 1984 Order, it inadvertently dismissed Yellow Bus' secondary boycott claim against Woodward again. The original dismissal on July 25, 1983 disposed of this claim.

These motions were opposed by Yellow Bus and its officers, who expressed doubt that the court would retain jurisdiction over their state law counterclaims if the court should permit Wooward to dismiss his federal claims in the original *Woodward* action. Because of this jurisdictional problem, argued Yellow Bus and its officers, Fed. R. Civ. P. 42(a)(2) bars the court from dismissing Woodward's claims. The court, however, believes that it can retain jurisdiction over the Yellow Bus and Yellow Bus officer counterclaims even if Woodward's claims are dismissed, and hence sees no reason to prevent Woodward from dismissing his claims. As this court previously held, it has ancillary jurisdiction over the state based counterclaims originally filed by the Yellow Bus officers and by Yellow Bus in the *Woodward* case, *see* May 5, 1983 Memorandum in *Woodward*. As several cases have held, the court can, in its discretion, retain ancillary jurisdiction over such counterclaims even if the plaintiff's original claim is dismissed, *see Dery v. Wyer*, 265 F.2d 804, 808 (2d Cir. 1959); *accord, Hill v. Rolleri*, 615 F.2d 886, 889 (9th Cir. 1980). As discussed more fully below, the interests of justice and judicial economy would best be served if Woodward's claims are dismissed and the court retains jurisdiction over the Yellow Bus and Yellow Bus officers counterclaims. Further, with regard to Yellow Bus (although not its officers), the court has pendent jurisdiction over its state claims against Woodward, since those claims, originally brought as counterclaims in *Woodward*, were asserted again by Yellow Bus as claims in *Yellow Bus*, and are still pendent to the federal RICO claim that remains against Woodward individually. Thus, because dismissal of Woodward's original claims is in the interest of judicial economy and presents no jurisdictional bar to the continued assertion of any counterclaims, the court granted Woodward's motions to dismiss.

B. *Motion for Summary Judgment and/or to Dismiss filed by Local 639*

Local 639 filed a motion for summary judgment seeking the dismissal of Yellow Bus' claims against the union asserted in the *Yellow Bus* complaint. The union argues that Yellow Bus' RICO and secondary boycott claims against the union should be dismissed on summary judgment, and that the pendent state tort claims against the the union should then be dismissed for lack of subject matter jurisdiction. For the reasons discussed below, the court held on June 1, 1984 that the union's motion would be granted with respect to the RICO and secondary boycott claims, but that the state tort claims would not be dismissed.

All of Yellow Bus' claims against the union arise out of events which occurred during and shortly after the November, 1981 strike. Yellow Bus alleges that James Woodward and others, at the union's direction, engaged in various illegal acts, including threats, violence, extortion, arson, and property destruction in an effort to intimidate Yellow Bus into recognizing Local 639 as the exclusive bargaining representative of its employees. Yellow Bus alleges that these actions constituted a pattern and practice of illegal acts by Woodward and the union designed to further the union's organizing goals and in violation of the Racketeering Influenced & Corrupt Organizations Act (RICO). Further, Yellow Bus alleges that threats and acts of violence against two secondary businesses—the Jewish Day School and McMichael Bus Service—constituted an illegal secondary boycott prohibited by the National Labor Relations Act, and that the union committed several state law torts against Yellow Bus during and after the strike.

1. *The RICO claim against Local 639.*

In Count One of the *Yellow Bus* complaint, Yellow Bus seeks treble damages and attorneys' fees against both

Woodward and Local 639 under the RICO Act, 18 U.S.C. §§ 1961 *et seq.* In pertinent part, 18 U.S.C. § 1962(c), which Yellow Bus alleges the union has violated, reads as follows:

> It shall be unlawful for any *person* employed by or associated with any *enterprise* . . . to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity . . . .

18 U.S.C. § 1962(c) [emphasis added]. Here Yellow Bus claims that Woodward, an officer in Local 639, *and* Local 639 itself are "persons" within the meaning of the Act, and that they both engaged in a "pattern of racketeering activity" to further the enterprise's goal of unionizing Yellow Bus. Yellow Bus maintains that the "enterprise" in this case is made up of both Woodward and Local 639. Yellow Bus catalogues numerous "predicate acts" allegedly committed by Woodward or the union in furtherance of the goals of the "enterprise." Yellow Bus further alleges that the "predicate acts" are crimes under local law, and that these acts of violence and extortion, which occurred around the time of the strike, form a "pattern" of racketeering activity.

Local 639 challenges Yellow Bus' RICO claim against it on several grounds. The court, however, finds it unnecessary to address each of these grounds because it finds that one of them is dispositive. Even if the court were to find that Yellow Bus had properly pled the existence of qualified "predicate acts," had shown that these acts formed a "pattern of racketeering activity," and had alleged a "RICO" injury, the court would find that Yellow Bus' RICO claim against the union must fail because, under the facts alleged or admitted by Yellow Bus, Local 639 is not a suable "person" but is a non-suable RICO "enterprise."

The court is persuaded by the reasoning of the RICO cases which have held that RICO was not intended to

impose civil liability upon a criminal "enterprise," but was intended to allow monetary recovery only against "persons" who have participated in the affairs of an enterprise through a pattern of racketeering activity, *Saine v. A.I.A., Inc.*, 582 F. Supp. 1299, 1306-07 (D.C. Col. 1984); *Fields v. National Republic Bank of Chicago*, 546 F. Supp. 123, 124 n.5 (N.D. Ill. 1982); *Bays v. Hunter Savings Assoc.*, 539 F.Supp. 1020, 1024 (S.D. Ohio 1982); *Van Schaick v. Church of Scientology of California, Inc.*, 535 F. Supp. 1125, 1136 (D. Mass. 1982), *see also Parnes v. Heinold Commodities, Inc.*, 548 F. Supp. 20, 23 (N.D. Ill. 1982). As the court stated in *Bay, supra*,

> The language of § 1962 clearly contemplates the interaction of a person and an enterprise, both separately defined by the Act. RICO prohibits any *person*, employed by or associated with an *enterprise*, from participating in the conduct of such enterprise through a pattern of racketeering activity. RICO does not hold the enterprise . . . liable, but only those *persons* who seek to participate in the affairs of the enterprise through a pattern of racketeering activity. . . . The language of RICO has been found to be ambiguous on other issues, but we find this language is clear and that our interpretation is supported by the case law.

539 F. Supp. at 1023-24. It is true, as Yellow Bus contends, that a union local can sometimes be considered a "person" under RICO, and in some circumstances may be sued in this capacity. For example, if a union local was engaging in a pattern and practice of racketeering in order to aid an outside criminal organization in the achievement of some objective, then the local may be considered a RICO "person" and the overarching organization an "enterprise." However, a union local cannot simultaneously be considered a RICO "person" *and* a RICO "enterprise." As the majority of courts, including

all of the courts analyzing RICO *civil* liability and the one court from the District of Columbia that has addressed this issue have held, a RICO "enterprise" cannot simultaneously be a RICO "person"/defendant. *Rae v. Union Bank*, 725 F.2d 478, 481 (9th Cir. 1984); *Bennett v. Berg*, 685 F.2d 1053, 1061 (8th Cir. 1982), *cert. denied sub nom., Prudential Insurance Co. v. Bennett*, 104 S.Ct. 527 (1983); *United States v. Computer Sciences Corp.*, 689 F.2d 1181, 1190 (4th Cir. 1982), *cert. denied*, 103 S.Ct. 729 (1983); *Saine*, 582 F. Supp. at 1306-07; *Guerrero v. Katzen*, 571 F. Supp. 714, 722 n.9 (D.D.C. 1983); *Van Schaick*, 535 F. Supp. at 1136. The few cases that have permitted such identity of RICO "person" with RICO "enterprise" are distinguishable or unpersuasive.[3] Therefore, if Local 639 in this case is properly viewed as the "enterprise," it is not a suable "person" under RICO.

Yellow Bus attempts to circumvent this legal difficulty in an effort to reach the economically viable union by alleging that the "enterprise" here is *not* simply Local 639, but is the union *plus* Woodward.[4] But Yellow Bus

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[3] Yellow Bus points to two cases which have held that the "enterprise" and the "person" can be the same entity in some circumstances, *United States v. Hartley*, 678 F.2d 961, 987-90 (11th Cir. 1982), *cert. denied*, 103 S.Ct. 815 (1983); *United States v. Benny*, 559 F. Supp. 264, 267-71 (N.D. Cal. 1983). Both were criminal cases, and, as *Fields* pointed out, their logic, even if accepted in this Circuit, would not necessarily apply to civil cases, *Fields*, 546 F. Supp. at 124 n.5. Further, in *Hartley* unique facts would have made it possible for the government to charge the person/enterprise without facing the "identity" problem by drawing the indictment in an equally logical but different way. As discussed *infra*, n.5, this is not the case here. Finally, although *Benny* offers the strongest support for Yellow Bus' position on this isue, it was implicitly reversed by the Ninth Circuit's decision in *Rae v. Union Bank*, 725 F.2d 478, 481 (9th Cir. 1984).

[4] This is not completely clear from the face of Yellow Bus' Complaint. It alleges that "defendants" are the "enterprise" and that "defendants" violated RICO. Such confused, or "blurred", definitions have been held to bar recovery under RICO, *see Guerrero v.*

also alleges, and it is uncontradicted, that Woodward is an *officer* (business agent) in Local 639. The court fails to see any distinction between the union as an entity, of which Woodward is already included as an officer, and the union *plus* Woodward. The whole is no different than the sum of its parts in this context. Hence the "enterprise" in this case, as argued by Local 639, is properly viewed as Local 639 by itself. Local 639's goals are allegedly being furthered by Woodward's racketeering activities, and Woodward is clearly "employed by and associated with" Local 639. The union is the sort of distinct legal entity that is logically labelled a RICO "enterprise." On the other hand, the "enterprise" alleged by Yellow Bus is a contrived partnership that is no different in fact or legal significance than the union by itself, since Woodward is a union officer. Because the union is properly viewed as the "enterprise" in this case, it is not suable, for the related reasons discussed above that RICO does not contemplate suits against an "enterprise," and that an entity cannot be considered a (suable) RICO "person" if it is properly classified as the "enterprise." [5]

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*Katzen*, 571 F. Supp. 714, 722 (D.D.C. 1983). Nevertheless, since Yellow Bus asserts in its pleadings that it intends the "enterprise" to be defined as Local 639 plus Woodward, the court will begin its analysis by accepting that allegation.

[5] *See* cases cited *supra*. Yellow Bus argues that there is no reason why the enterprise cannot consist of a union plus one of its officers. It argues that this is analogous to an enterprise consisting of a corporation plus its officers, and that such "enterprises" have been approved in *Moss v. Morgan Stanley, Inc.*, 719 F.2d 5 (2d Cir. 1983), *cert. denied sub nom., Moss v. Newman*, 104 S.Ct. 1280 (1984). However, *Moss* did not approve of such an enterprise—the RICO enterprise there consisted of three corporate officers (and not the corporation), *id.* at 22. Further, in *Moss*, where the corporation was originally named as a RICO defendant, the district judge dismissed the corporation—analogous to this court's dismissal of the union as a defendant, *id.* at 9 n.4. In the one other case pointed to by Yellow Bus in which a union was sued together with

If this court were to allow a RICO "enterprise" to be defined as a legally distinct umbrella organization *plus* one of its officers, or subparts, then civil RICO plaintiffs would always be able to sue the umbrella organization

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its officers under RICO, the union was also dismissed as a defendant, *United States v. Local 560*, 581 F. Supp. 279, 337 (D.N.J. 1984). Attempts to create an "enterprise" for RICO purposes have been rejected when the enterprise is alleged to be an umbrella entity plus one of its subparts. As Yellow Bus itself points out, the court in *United States v. Computer Sciences*, 689 F.2d 1181, 1190 (4th Cir. 1982), *cert. denied*, 103 S.Ct. 729 (1983), saw no distinction between a corporation and its unincorporated subdivision, and held that a RICO suit did not lie against the corporation because it was really an "enterprise."

Yellow Bus also apparently ignores the requirement that there must be some proof that the enterprise alleged actually existed and is not simply a legal fiction. As its pleadings filed subsequent to the hearing indicate, Yellow Bus is eager to amend its complaint in any way to avoid the legal bar against identity of RICO defendant and RICO enterprise. But the new combinations it proposes are obviously not based in fact, and still do not qualify as enterprises that would permit suit against the union as a defendant. In particular, Yellow Bus' proposal to name Yellow Bus as the enterprise would not permit suit against the union because the union's acts were not committed in the conduct of *Yellow Bus'* affairs; Yellow Bus was, if anything, merely the "setting" for the union's activities, *see United States v. Scotto*, 641 F.2d 47, 54-55 (2d Cir. 1980), *cert. denied*, 452 U.S. 961 (1981); *Engl v. Berg*, 511 F. Supp. 1146, 1155 (E.D. Pa. 1981). For this reason, and because Yellow Bus' attempts to change its definition of "enterprise" come too late and do not properly defeat a summary judgment motion, the court denied Yellow Bus' motion to amend its complaint by interlineation.

The court also notes that its holding that the union cannot be sued in this case in no way defeats Congress' intent to stop union corruption through RICO prosecutions. First, even from the passage in RICO's legislative history cited by Yellow Bus, it is clear that Congress intended to stop such corruption primarily by creating a right of action against allegedly corrupt *individuals within* unions, and did not clearly contemplate suits against the union itself as an entity, *see* S. Rep. No. 91-617, 91st Cong., 1st Sess. at 78 (1969). Second, as discussed *supra*, the court's holding that the union as an entity cannot be sued in this case does not imply that RICO suits against unions would be barred in all cases.

by simply alleging that the "enterprise" consists of the organization plus one of its members, making the organization alone a distinct and suable RICO "person." As discussed above, RICO does not contemplate such suits against organizations whose goals are allegedly being furthered by the activities or groups *within* such organizations; such organizations are labelled "enterprises." In fact, even in a case heavily relied upon by *Yellow Bus* for the proposition that an entity *can* be both an enterprise and a person under RICO, the court recognized that in situations analogous to that presented here, the Act contemplates suits against responsible individuals, not against the organization they belong to, *see United States v. Benny*, 559 F. Supp. 264, 269 (N.D. Cal. 1983) ("The argument against identification of defendant and enterprise might be viable where a corporate [or union] defendant is involved. In such a situation, the government remains able to prosecute the culpable individuals—agents, officers, employees—associated with the corporate [or union] enterprise."); *see also Saine*, 582 F. Supp. at 1306-07 & n.7. Here, *Yellow Bus* is free to proceed with its RICO claim against Woodward, but its claim against Local 639 must be dismissed, since Local 639 is properly viewed as the "enterprise" and cannot be sued as a RICO defendant.

2. *The "secondary boycott' claim against Local 639*

It is an unfair labor practice under § 8(b)(4) of the National Labor Relations Act, 29 U.S.C. § 158(b)(4), to engage in what has come to be known as a "secondary boycott" during a labor dispute with the "primary" employer. The statute bans "secondary" activity, but simultaneously protects "primary" activity; and as the United States Supreme Court has noted, the dividing line between the two is often very difficult to draw, *see Brotherhood of Railroad Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, 388, 89 S.Ct. 1109, 1121 (1969); *United Steel-*

*workers v. N.L.R.B.*, 376 U.S. 492, 496, 84 S.Ct 899, 902 (1964). The problem stems from the fact that all primary strikes have the intentionally coercive effect of preventing others from doing business with the primary employer, in apparent violation of § 8(b)(4), yet such primary activity is clearly permissible under federal labor statutes in general and has been repeatedly held not to violate § 8(b)(4) in particular. After careful consideration, the court has concluded that the activities alleged by Yellow Bus to be "secondary" in this case, although violent and possibly illegal under other provisions of law, are *not* secondary activities violative of § 8(b)(4).

Yellow Bus, in its Complaint, does not specifically enumerate which alleged acts are deemed to constitute unlawful secondary activity, but instead merely refers to a catalogue of acts set forth in ¶ 7 of its Complaint and alleges that, taken together, they constitute a violation of § 8(b)(4). Most of these acts are clearly primary activity, despite counsel's cursory argument to the contrary.[6] However, four of the alleged acts arguably constitute secondary activity, and have been the focus of debate on this issue. First, Yellow Bus alleges that defendants ice-picked the tires of six buses parked on the lot of the Jewish Day School, Yellow Bus' most important contract. *Yellow Bus* Complaint at ¶ 7(b). Second, Yellow Bus alleges that strikers told the parents of Jewish Day School ("JDS") children that drivers were carrying guns and that the brake lines of the buses used during the strike would be cut. *Id.* at ¶ 7(o), (p). Third, an

[6] Counsel for Yellow Bus argued that violence directed against the private property of Yellow Bus employees who refused to strike, *see* Complaint at ¶ 7(h)-(1), constituted secondary activity barred by § 8(b)(4), and that the strikers' refusal to permit Yellow Bus buses to leave the lot, because it prevented Yellow Bus from doing business with others, also constituted a violation of § 8(b)(4). Such activity, however, because directed exclusively at Yellow Bus and its employees, is *primary* activity and not violative of § 8(b)(4) despite its incidental effects.

agent of defendants' allegedly telephoned McMichael Bus Service, which was handling Yellow Bus routes during the strike, and said that if McMichael Bus continued to assist Yellow Bus during the strike it would get "the same treatment." *Id.* at ¶ 7(q). Fourth, an unknown agent of defendants allegedly cut the brake lines on a McMichael Bus used during the strike to assist Yellow Bus. *Id.* at ¶ 7(r).

All of these acts are violent or threatening in nature, and constitute reprehensible behavior, if they in fact occurred. However, the Supreme Court has explicitly held that even violent and threatening acts are *not* violations of § 8(b)(4) if they are primary, and not secondary, activities. *United Steelworkers*, 376 U.S. at 501-502, 84 S.Ct. at 905; *accord*, *Federal Prescription Service v. Amalgamated Meat Cutters, Inc.*, 527 F.2d 269, 274 (8th Cir. 1975); *Clark Engineering & Construction Co. v. United Brotherhood of Carpenters*, 510 F.2d 1075, 1081 (1975). In other words, the violent nature of defendants' alleged activity does not transform it into secondary activity; the court must proceed to analyze each act to determine if it is properly classified as "primary" or unlawful "secondary" activity.

The two alleged acts against McMichael Bus Service, upon even cursory examination, are not proscribed secondary activity because they were directed against an entity that was hired by Yellow Bus to handle work that would otherwise have been performed by striking employees. Yellow Bus so alleges, *see* Complaint at ¶ 7(q), and the role of McMichael was confirmed by Yellow Bus' counsel during oral argument. McMichael is therefore an "ally" of Yellow Bus, and Yellow Bus employees had a legitimate primary interest in preventing it from performing work in place of themselves. *Carpet, Lenoleum, Etc., Local Union No. 419 v. N.L.R.B.*, 429 F.2d 747, 752-54 (D.C. Cir. 1970); *N.L.R.B. v. Business Machine & Office Appliance Mechanics, Etc.*, ("*Royal Type-*

*writer*"), 228 F.2d 553, 558-59 (2d Cir. 1955); *see Jacksonville Terminal Co.*, 394 U.S. at 388-89, 89 S.Ct. at 1121. The acts alleged against McMichael are therefore not "secondary" activity, and are not proscribed by § 8 (b) (4).

The striking employees' alleged ice-picking of the tires of Yellow Bus' buses parked on the Jewish Day School lot is also properly considered primary activity, even though it has the incidental effect of penalizing JDS for doing business with Yellow Bus, and of preventing such business. First, it is not clear from the facts alleged or proffered that the strikers' activity was aimed directly at JDS or its employees; to the contrary, the destruction of Yellow Bus' property appears to have been aimed directly at Yellow Bus. In any event, the dispositive point is that because Yellow Bus routinely parked its buses at JDS, a fact not controverted by Yellow Bus, activity at the JDS lot must be considered primary, and is not violative of § 8(b) (4) under the "common situs" doctrine, *Teamsters Local 294 (Montgomery Ward Co.)*, 192 NLRB 155 (1972); *see United Steelworkers*, 376 U.S. at 496-500, 84 S.Ct. at 902-904; *accord*, *Jacksonville Terminal Co.*, 394 U.S. at 388-390, 89 S.Ct. at 1121-22. Again, although the alleged violent and destructive nature of the strikers' alleged activity is condemnable, because it was directed against Yellow Bus' property parked in its usual location, the activity does not fall within the prohibition of § 8(b) (4).

Finally, the court has concluded that the strikers' alleged threats directed against parents of JDS children cannot be considered proscribed secondary activity. The threat allegedly made to Mr. Sotsky was uttered from picketers at the Yellow Bus premises, *see* Sotsky Affidavit, filed in *Woodward* on July 14, 1983. There is no indication that the strikers were interested in unionizing JDS employees or in closing down JDS—their clear intention was to stop JDS from using Yellow Bus buses during the

strike. Coercion against JDS parents, whose children rode Yellow Bus buses, is analogous to picketing of a primary employers' wholesale buyer's premises to persuade retail consumers from buying the primary employer's product from the picketed store. Under the "Tree Fruits" doctrine, such activity directed against consumers is not violative of § 8(b)(4), *N.L.R.B. v. Vegetable Packers and Warehousemen, Local 760*, 377 U.S. 58, 84 S.Ct. 1063 (1964); *Local 14055, United Steelworkers of America v. N.L.R.B.*, 524 F.2d 853 (D.C.Cir. 1975), *vacated and remanded due to intervening circumstances, Dow Chemical Co. v. Local 14055, United Steelworkers*, 429 U.S. 807 (1976).

In sum, none of the activities alleged by Yellow Bus constitute unlawful secondary activity, even though they may have had an incidental effect of coercing others not to do business with Yellow Bus. Therefore, even if Yellow Bus' Complaint is taken as true, Local 639 has not violated § 8(b)(4), and summary judgment was granted in the union's favor on Count Two.

3. *Yellow Bus' state tort claims against Local 639*

The merits of Yellow Bus' tort claims against Local 639, alleged in Counts Three through Five of the *Yellow Bus* Complaint, were not extensively contested by the union in its motion for summary judgment. Instead, Local 639 argued that because these claims are pendent to Yellow Bus' federal claims, dismissal of the federal claims should result in dismissal of the state claims for lack of subject matter jurisdiction. However, although *United Mine Workers of America v. Gibbs*, 383 U.S. 715, 86 S.Ct. 1130 (1966) *recommends* dismissal of pendent claims if federal claims are dismissed prior to trial, it does not require it. To the contrary, *Gibbs* makes it clear that the court has jurisdiction to hear such claims, and that it is within the court's discretion to retain jurisdiction over the state claims if such action is in the interest

of judicial economy, convenience, and fairness to litigants, *id.*, 383 U.S. at 726, 86 S.Ct. at 1139. In this case, the court finds that retention of Yellow Bus' state claims serves these interests. This case was filed over 18 months ago, and numerous depositions have already been taken. The parties are fully prepared to go forward in this court. There is still one federal claim in the case (a RICO claim against Woodward). According to Local 639's Statement of Material Facts, there is also diversity of citizenship between Yellow Bus and the union, so if the court were to dismiss Yellow Bus' pendant claims against the union here, Yellow Bus could refile those same tort claims in federal court as a diversity action. The court, therefore, has elected to retain its jurisdiction over the tort claims brought by Yellow Bus against the union, to be tried along with the other remaining claims by Yellow Bus and its officers against Woodward. Such retention of jurisdiction after dismissal of federal claims has commonly been upheld, *see, e.g., Rosado v. Wyman*, 397 U.S. 397, 402-05; 90 S.Ct. 1207, 1212-14 (1970); *Lentino v. Fringe Employee Plans, Inc.*, 611 F.2d 474, 479 (3d Cir. 1979); *Gray v. International Ass'n of Heat & Frost Insulators*, 447 F.2d 1118, 1120 (6th Cir. 1971); *Gem Corrugated Box Corp. v. National Kraft Container Corp.*, 427 F.2d 499, 501 n.1 (2d Cir. 1970).

/s/ Thomas A. Flannery
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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Civil Action No. 82-3154

JAMES F. WOODWARD,
*Plaintiff,*

v.

MICHAEL DIPALERMO, *et al.*,
*Defendants.*

---

Civil Action No. 83-1232

YELLOW BUS LINES, INC.,
*Plaintiff,*

v.

DRIVERS, CHAUFFEURS & HELPERS
LOCAL UNION 639, *et al.*,
*Defendants.*

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[Filed June 1, 1984]

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ORDER

This matter came before the court on several motions that call for resolution prior to pretrial. A hearing was held on all of these motions on May 31, 1984, and the court has carefully considered the arguments advanced by counsel at the hearing and in the papers filed. In the near future, the court will issue a Memorandum Opinion to explain the reasons for this Order, but in order to

apprise the parties of the court's disposition of all pending motions most expeditiously, the court has decided to issue this Order prior to issuing its opinion. Accordingly, for the reasons to be stated in a forthcoming Memorandum Opinion, after careful consideration of the pending motions, the oppositions thereto, arguments of counsel, and the entire record in this case, it is, by the court, this 1st day of June, 1984,

ORDERED that Yellow Bus' Notice of Appeal from the Magistrate's April 18, 1984 Order regarding use of expert witnesses is denied; and it is further

ORDERED that the motion for dismissal of James Woodward's action against the District of Columbia and Michael DiPalermo is granted; and it is further

ORDERED that James Woodward's oral motion to dismiss all remaining claims brought by him is granted; and it is further

ORDERED that defendant Local 639's motion for summary judgment and/or to dismiss is granted in part and denied in part; and it is further

ORDERED that defendant Local 639's motion for summary judgment is granted with respect to Count I of Yellow Bus' complaint, the RICO claim; and it is further

ORDERED that defendant Local 639's motion for summary judgment is granted with respect to Count II of Yellow Bus' complaint, the secondary boycott claim; and it is further

ORDERED that defendant Local 639's motion for summary judgment is denied with respect to Counts III, IV and V of Yellow Bus' complaint, as the court has determined it would not be in the interests of justice or judicial economy to dismiss these pendent claims at this late stage of the litigation; and it is further

ORDERED, *sua sponte*, that, in the interests of justice, Yellow Bus' secondary boycott claim against *pro se* defendant Woodward, in Count II of Yellow Bus' complaint, is dismissed; and it is further

ORDERED that Yellow Bus' motion for leave to file amendment by interlineation is denied.

/s/ Thomas A. Flannery
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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Civil Action No. 82-3154

JAMES F. WOODWARD,
*Plaintiff,*

v.

MICHAEL DIPALERMO, *et al.*,
*Defendants.*

---

Civil Action No. 83-1232

YELLOW BUS COMPANY, INC.,
*Plaintiff,*

v.

DRIVERS, CHAUFFEURS & HELPERS
LOCAL UNION 639, *et al.*,
*Defendants.*

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[Filed Oct. 27, 1984]

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ORDER

This matter came before the court on defendant Local 639's motion for summary judgment and/or to dismiss, or, in the alternative, for a separate trial. For the reasons set forth in the accompanying Memorandum, and after careful consideration of defendant's motion, plaintiff's several oppositions thereto, and the entire record in this case, it is, by the court this 29th day of October, 1984,

ORDERED that defendant Local 639's motion for summary judgment and/or to dismiss or, in the alternative, for a separate trial is denied; and it is further

ORDERED that defendant Local 639's request that plaintiff's RICO claim against defendant Woodward be dismissed is granted; and it is further

ORDERED that pretrial and trial dates for plaintiff's remaining claims will be established at a status conference to be held on November 9, 1984 at 9:30 a.m.

/s/ Thomas A. Flannery
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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Civil Action No. 82-3154

JAMES F. WOODWARD,
*Plaintiff*,

v.

MICHAEL DiPALERMO, *et al.*,
*Defendants.*

---

Civil Action No. 83-1232

YELLOW BUS COMPANY, INC.,
*Plaintiff*,

v.

DRIVERS, CHAUFFEURS & HELPERS
LOCAL 639, *et al.*,
*Defendants.*

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[Filed Oct. 29, 1984]

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## MEMORANDUM

This matter came before the court on a motion by defendant Drivers, Chauffeurs & Helpers Local Union 639 ("Local 639" or "union") for summary judgment and/or to dismiss or, in the alternative, for a separate trial. For the reasons stated herein, defendant's motion to dismiss is granted in part and denied in part. The court will dismiss the RICO claim against defendant Woodward, but retain jurisdiction over the remaining state tort claims against Woodward and Local 639.

The facts and background of this case are set forth in the court's previous Memorandum opinion of June 28, 1984. For the reasons set forth therein, the court dismissed plaintiff's two federal claims against defendant Local 639. However, the court elected to retain jurisdiction over plaintiff's four state tort claims against the union, and to try those claims along with plaintiff's claims against Local 639 business agent Woodward for violation of the Racketeering Influenced & Corrupt Organizations Act ("RICO") and for allegedly committing several state law torts.

Although recent decisions of the United States Court of Appeals for the Second Circuit now convince the court that plaintiff's RICO claims against defendant Woodward must be dismissed on summary judgment, the court is persuaded that under Rule 41(a)(2) of the Federal Rules of Civil Procedure and the doctrines of pendent and ancillary jurisdiction it has both the obligation and the authority to retain jurisdiction over the remaining state law claims in this case. Because the court has dismissed the RICO claim against Woodward, any danger of confusion and prejudice to defendant Local 639 by trying these cases together has been eliminated, and the union's motion for a separate trial will therefore be denied.

DISCUSSION

1. *The RICO claim against Woodward*

Yellow Bus seeks treble damages and attorneys' fees under the RICO Act, 18 U.S.C. §§ 1961 *et seq.* Section 1962(c), which Yellow Bus alleges Woodward has violated, makes it

> unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the con-

> duct of such enterprise's affairs through a pattern of racketeering activity . . . .

18 U.S.C. § 1962(c). Section 1962(d) prohibits any conspiracy to violate subsection (c). Yellow Bus claims it is entitled to relief for alleged violations of these RICO provisions under section 1964(c), the so-called "civil RICO" provision, which provides that

> [a]ny person injured in his business or property by reason of a violation of section 1962 . . . may sue therefore in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee.

18 U.S.C. § 1964(c).

Defendant argues that the civil remedy under section 1964(c) is available only to plaintiffs who can demonstate a separate and distinct injury caused by the pattern of racketeering activity rather than by the underlying predicate acts that constitute the pattern. In adopting defendants' position, the court recognizes that the meaning of section 1964(c) is still in dispute. Nevertheless, the court holds that recent rulings on this precise issue by the Second Circuit Court of Appeals, as well as prior rulings by this and other district courts, are persuasive.[1]

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[1] In late July, 1984, the United States Court of Appeals for the Second Circuit announced decisions in three cases which support defendant's position on a more narrow interpretation of the civil remedy under section 1964(c). In *Bankers Trust Co. v. Rhoades*, the court affirmed the dismissal of a complaint for failure to state a claim under the civil RICO provision. No. 83-7636 (2d Cir. July 26, 1984). The court held that although the complaint alleged a scheme to defraud plaintiff through concealment of assets and bribery, slip op. at 3, the injury alleged was only caused by the individual predicate acts, rather than "a distinct RICO injury, *i.e.*, an injury caused by a violation of § 1962." Slip op. at 15. Rejecting plaintiff's argument that it is conceptually impossible to distinguish between the injury flowing from the predicate acts and

On the authority of those decisions, the court thus holds that

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the injury flowing from a "pattern of racketeering activity," the court held that

> [i]f a plaintiff's injury is caused by the predicate acts themselves, he is injured regardless of whether or not there is a pattern; hence he cannot be said to be injured *by* the pattern, and the pattern cannot be said to be the but-for cause of the injury.

Slip op. at 14 (emphasis in original).

In *Sedima, S.P.R.L. v. Imrex Co., Inc.*, No. 83-7965 (2d Cir. July 25, 1984), the court similarly affirmed the dismissal of a civil RICO action for failure to allege a "RICO-type injury" and for the additional reason that a prior criminal conviction is a prerequisite to a civil RICO action. Slip op. at 20. As in *Bankers Trust*, the court in *Sedima* held that the "by reason of" language in section 1964 "requires that plaintiffs allege injury caused by an activity which RICO was designed to deter, which, whatever it may be, is different from that caused simply by such predicate acts as are alleged here." Slip op. at 16-17. The court held that the "by reason of" language was intended as a standing limitation, allowing a plaintiff to bring an action under civil RICO only upon a showing of the harm that RICO was intended to prevent, that is, the "systemic harm to competition and the market" caused by the infiltration of legitimate enterprises by mobsters and organized crime. Slip op. at 19. The court further held that a plaintiff may not bring a private civil RICO action absent criminal convictions on the underlying predicate offenses. Slip op. at 32. While this court declines to adopt the latter holding on the necessity of a criminal conviction, *Sedima* is persuasive on the need for an allegation of a "RICO-type injury" in addition to the injury caused by the underlying predicate acts. Finally, in a third case, *Furman v. Cirrito*, No. 84-7113 (2d Cir. July 27, 1984), the court disagreed with *Bankers Trust* and *Sedima* on the "RICO injury" issue, but abided by the prior rulings and affirmed the district court's dismissal on the basis that the plaintiff had failed to allege a "separate, distinct racketeering enterprise injury." Slip op. at 2.

The position that an action under section 1964(c) must allege more than the commission of the underlying crimes also finds support in a prior decision of this court. In *Guerrero v. Katzen*, 571 F. Supp. 714 (D.D.C. 1983), Chief Judge Robinson held that based on the "by reason of" language of section 1964(c), a plaintiff must

> if a complaint alleges a proprietary injury that is caused by the defendant's predicate acts, rather than by its use of a pattern of racketeering activity in connection with a RICO enterprise, the injury cannot be said to have been caused by 'a violation of section 1962.'

*Bankers Trust Co. v. Rhoades, et al.*, Civ. No. 83-7636, slip op. at 13 (2d Cir. July 26, 1984).

The question then remains whether, as in *Bankers Trust*, *Sedima*, and *Guerrero*, Yellow Bus has failed to state a valid claim under civil RICO. That question must be answered in the affirmative. The only injuries alleged by Yellow Bus result as a direct consequence of the predicate acts, and involve no distinct proprietary injury caused by a RICO violation. *See Bankers Trust*, slip op. at 10, 13. A civil RICO plaintiff must "show injury different in kind from that occurring as a result of the predicate acts themselves, or not simply caused by the predicate acts, but also caused by an activity which RICO was designed to deter." *Sedima, S.P.R.L. v. Imrex Co., Inc.*, No. 83-7965, slip op. at 20 (2d Cir. July 25, 1984); *see also Guerrero v. Katzen*, 571 F. Supp. 714, 718-19 (D.D.C. 1983). Here, in contrast, Yellow Bus has failed to allege any injury apart from that which would result directly from the alleged predicate acts ennumerated in paragraph 12 of its complaint. An interpretation of RICO broad enough to encompass the allegations in plaintiff's complaint would effectively federalize the state claims underlying Yellow Bus' com-

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allege that the injuries sustained were caused by the "distinctive RICO violation, and not simply by the commission of the predicate offenses." 517 F. Supp. at 718. "In other words," the court held, "a plaintiff must plead a 'RICO injury' or a 'racketeering enterprise injury.'" *Id.* Because the RICO allegations made by plaintiff were deemed to add nothing to the substance of plaintiff's claim that it was injured by reason of defendant's fraud, the court held that plaintiff had failed to state a claim under civil RICO. *Id.* at 720-22.

plaint, enabling plaintiffs to sue for treble damages and attorney's fees under RICO "nearly anytime they could allege injury caused by two acts which are violations of any one of the predicate acts listed in RICO." *See Sedima*, slip op. at 5. That is an outcome which, at least absent guidance from our own Court of Appeals, this court refuses to accept.

Although the court's resolution of the availability of a RICO cause of action against Woodward eliminates the last remaining federal claim in the suit between Woodward and Yellow Bus, the court will still exercise jurisdiction over the remaining state law claims. As the court previously held, it retains ancillary jurisdiction over the state-based counterclaims originally filed by the Yellow Bus officers and by Yellow Bus in the *Woodward* case after Woodward's original claim was dismissed. *See* June 28, 1984 Memorandum at 5 and cases cited therein. Indeed, as the court recognized in its June 28 Memorandum, dismissal of Woodward's federal claims in the original *Woodward* action would have been improper unless the counterclaims could remain pending for independent adjudication by this court. *See* Fed. R. Civ. P. 41(a)(2). Since this court's jurisdiction over the state law counterclaims thus did not depend upon the existence of the federal RICO allegation against Woodward, dismissal of that claim does not deprive this court of jurisdiction over the remaining state law claims.

2. *Jurisdiction over state tort claims against Local 639*

When the court issued its June 28, 1984 Memorandum, it was under the impression that there was diversity of citizenship between Local 639 and plaintiff Yellow Bus. *See* June 28, 1984 Memorandum at 17. The court reasoned that dismissal of plaintiff's state law claims against the union, which had been pending for many months, would have been an empty exercise, since plain-

tiff could have turned around the next day and filed a diversity action against the union in federal court. In addition, the court recognized that this case had already been before the court for more than eighteen months, and that numerous depositions had already been taken. Therefore, the court held that the interests of judicial economy, convenience, and fairness to litigants would all be furthered by retaining jurisdiction. *See id.* at 16-17.

It has since come to the court's attention that there is no diversity between Local 639 and plaintiff. *See United Steel Workers v. R.H. Bouligny, Inc.*, 382 U.S. 145, 86 S. Ct. 272 (1965). In *Bouligny*, the Supreme Court held that an unincorporated labor union was not a citizen of the state in which it had its principal place of business for purposes of federal diversity jurisdiction, but rather that its citizenship was that of each of its members. *Id.*, 382 U.S. at 153, 86 S. Ct. at 276. In the present case the plaintiffs claim citizenship in Maryland and Virginia. The union members reside, work, and receive representation and other services from the union in the District of Columbia, Maryland, and Virginia. *See* Affidavit of John Catlett in Support of Defendant's Motion for Summary Judgment and/or to Dismiss. Therefore, because *Bouligny* precludes recognition of the union as a citizen solely of the District of Columbia for purposes of diversity jurisdiction, there would be no diversity between Yellow Bus and Local 639 and plaintiff would be unable to obtain a federal forum for its state law claims against the union if it brought a separate suit in diversity.

Nevertheless, the court has decided to exercise its discretion under the doctrine of pendent jurisdiction to retain jurisdiction over the remaining state law claims against Local 639. Although the court's discretionary power to hear pendent state claims is not normally exercised if the federal claims are dismissed prior to trial, *see United Mine Workers v. Gibbs*, 383 U.S. 715, 726,

86 S. Ct. 1130, 1139 (1966), this court retains the power to decide the pendent state claims, *see Financial General Bankshares, Inc. v. Metzger*, 680 F.2d 768, 769 (D.C. Cir. 1982), and considerations of judicial economy, convenience, and fairness to the litigants dictate that this court retain jurisdiction.

Several factors demonstrate that this exercise of the court's discretion is proper. First, the court notes that it was Woodward, not Yellow Bus or its officers, who chose the federal forum to litigate the claims upon which this case originated and upon which the subsequent claims of the defendant union have been appended. In the time that has passed since that original suit, now nearly two years, Woodward, the union, Yellow Bus, and its officers have expended considerable time and effort in this court narrowing the issues and developing their cases in preparation for trial. The remaining claims against Woodward and Local 639 are virtually identical, thus eliminating any likelihood of jury confusion in treating divergent theories of relief as cautioned against in *Gibbs*. 383 U.S. at 727, 86 S. Ct. at 1139. Further, dismissal of the remaining RICO count against Woodward removes the threat of prejudice to the union that would be presented by trying the state claims against the union together with the RICO count against Woodward. In fact, with the RICO claim removed, counsel for Yellow Bus has represented that there will be an almost complete identity between the evidence introduced against Woodward and that presented to support Yellow Bus' claim against Local 639. Finally, although some of plaintiff's claims might properly be considered unusual, this case will not require the court to resolve unsettled issues of District of Columbia law more properly dealt with by local courts. This court anticipates little difficulty in obtaining adequate guidance from local jurisprudence on the issues of causation and damages presented in this action. *See Financial General Bankshares, Inc. v. Metzger*,

680 F.2d at 776. Given that this court may well be *required* to address these issues in the context of the counterclaims over which this court has ancillary jurisdiction in the *Woodward* case, no purpose would be served by dismissing those same claims for local court adjudication in *Yellow Bus*. On the basis of all these factors, the court holds that dismissing the pendent state tort claims and forcing Yellow Bus to refile in the District of Columbia courts would not be a prudent exercise of this court's discretion. *See Financial General Bankshares, Inc. v. Metzger*, 680 F.2d at 773.

For the reasons stated above, the remaining RICO claim against Woodward is dismissed. The motion of Local 639 for dismissal and/or a separate trial on the remaining state law claims against it is denied. Pretrial and trial dates for the state law tort claims against Woodward and Local 639 will be set at a status conference to be scheduled by the court.

An appropriate Order accompanies this Memorandum.

/s/ Thomas A. Flannery
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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September Term, 1987

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No. 86-5135

YELLOW BUS LINES, INC.,
*Appellant*

v.

DRIVERS, CHAUFFEURS & HELPERS
LOCAL UNION 639, *et al.*

Civil Action No. 83-01232

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No. 86-5136

JAMES F. WOODWARD

v.

MICHAEL DIPALERMO, *et al.*

MARIA TRIGGS, SECRETARY/TREASURER,
YELLOW BUS LINES, et al.,
*Appellants*

Civil Action No. 82-03154

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[Filed Feb. 12, 1988]

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Appeals from the United States District Court
for the District of Columbia

Before: WALD, *Chief Judge*, MIKVA and EDWARDS, Circuit Judges.

JUDGMENT

These causes came on to be heard on the records on appeal from the United States District Court for the District of Columbia, and were argued by counsel. On consideration thereof, it is

ORDERED and ADJUDGED, by the Court, that the judgment of the District Court appealed from in these causes is hereby affirmed in part and reversed in part, and these cases are remanded, in accordance with the Opinion for the Court filed herein this date.

*Per Curiam*
For the Court

/s/ Constance L. Dupre
CONSTANCE L. DUPRE
Clerk

Date: February 12, 1988

Opinion for the Court filed by Circuit Judge Mikva.

Concurring statement filed by Circuit Judge Edwards.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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September Term, 1987

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No. 86-5135

YELLOW BUS LINES, INC.,
*Appellant*

v.

DRIVERS, CHAUFFEURS & HELPERS
LOCAL UNION 639, *et al.*
and consolidated case 86-5136

Civil Action No. 83-01232

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[Filed Apr. 12, 1988]

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Before: Wald, Chief Judge; Mikva and Edwards, Circuit Judges.

ORDER

Upon consideration of Appellees' Petition for Rehearing, Filed March 14, 1988, it is

ORDERED, by the Court, that the Petition is denied.

*Per Curiam*
FOR THE COURT:

CONSTANCE L. DUPRE
Clerk

By: /s/ Robert A. Bonner
ROBERT A. BONNER
Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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September Term, 1987

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No. 86-5135

YELLOW BUS LINES, INC.,
*Appellant*

v.

DRIVERS, CHAUFFEURS & HELPERS
LOCAL UNION 639, *et al.*
and consolidated case 86-5136

C.V. No. 83-01232

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[Filed Apr. 12, 1988]

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Before: Wald, Chief Judge; Robinson, Mikva, Edwards, Ruth B. Ginsburg, Starr, Silberman, Buckley, Williams, D. H. Ginsburg and Sentelle, Circuit Judges

ORDER

Appellees' Suggestion for Rehearing *En Banc* has been circulated to the full Court. The taking of a vote thereon was requested. Thereafter a majority of the Judges of the Court in regular active service did not vote in favor of the suggestion. Upon consideration of the foregoing, it is

ORDERED, by the Court *en banc*, that Appellees' suggestion is denied.

FOR THE COURT:

CONSTANCE L. DUPRE
Clerk

By: /s/ Robert A. Bonner
ROBERT A. BONNER
Deputy Clerk

A dissenting statement by Circuit Judge Sentelle, joined by Circuit Judge Starr, is attached.

SENTELLE, *Circuit Judge*, dissenting from denial of en banc review: The panel opinion in this matter in my view reflects two serious errors in the application of the Racketeer Influenced and Corrupt Organizations Act (RICO) 18 U.S.C. § 1961 *et seq.* (1982) as to questions which are likely, if not inevitably, going to recur.

First, and perhaps most importantly, I do not believe that the history of the Act or its wording supports a view that a striking union is "participat[ing] in the conduct of the affairs" of the struck company, as required in the application of § 1962(c). The Federal Labor laws are designed to preserve a precarious balance between the economic weapons available to labor organizations and employers during labor disputes. *See, e.g. NLRB v. Brown*, 380 U.S. 278 (1965). At the foundation of this mobile, is an adversarial relationship. Labor laws carefully designed to maintain the precarious balance expressly recognize the right to strike. 29 U.S.C. § 163.

Further, the panel opinion here defines the "pattern" requirement of 18 U.S.C. § 1962(c) in such an expansive way as to permit the predicate acts to be based on substantially isolated occurrences aimed at a single objective. I suggest that this is in conflict with at least four other Circuits. *See Marshall Silver Construction Co., Inc. v. Mendel*, 835 F.2d 63 (3rd Cir. 1987); *International Data Bank Ltd. v. Zepkin*, 812 F.2d 149 (4th Cir. 1987); *Lipton Ind., Inc. v. Lee*, 803 F.2d 322 (7th Cir. (1986); and *Jarvis v. Regan*, 833 F.2d 149 (9th Cir. 1987).

When these two readings (I suggest misreadings) of the statute are coupled in the law of this Circuit, any union in making a determination to strike, faces the possibility that if two fist fights or two acts of vandalism occur on the picket line, it will find itself and its members hauled into court as RICO defendants. It would appear to me that if Congress had intended to so re-

structure the balance of economic weapons between labor and management as to place this sort of chill on a union's decision to exercise its right to strike, it would have done so by an explicit provision within the labor laws and not by the general language of the RICO statute.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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September Term, 1987

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No. 86-5135

YELLOW BUS LINES, INC.,
*Appellant*

v.

DRIVERS, CHAUFFEURS & HELPERS
LOCAL UNION 639, *et al.*
and consolidated case 86-5135

C.V. No. 83-01232

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[Filed May 6, 1988]

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Before: Wald, Chief Judge, Mikva and Edwards, Circuit Judges

ORDER

Upon consideration of appellant's petition for rehearing, filed March 11, 1988, it is

ORDERED, by the Court, that the petition is denied.

FOR THE COURT:

CONSTANCE L. DUPRE
Clerk

By: /s/ Robert A. Bonner
ROBERT A. BONNER
Deputy Clerk